

1596

A COMPENDIOUS
T R E A T I S E
OF THE
R U L E S
AND
P R A C T I C E
OF THE
P L E A S I D E
OF THE
EXCHEQUER in *IRELAND*.
A S

It now stands between Party and Party, with the
RULES of the said Court, and an Abridgment under
each Head of PRACTICE, of the several Acts of Par-
liament now in Force relating thereto.

IN TWO VOLUMES.

V O L. I.

This Work is with all Deference, most humbly inscribed to the
Right Honourable and Honourable, the *Chancellor, Treasurer,*
Lord Chief Baron, and the rest of the Barons of the Court of
Exchequer, by their most devoted and

most obedient humble Servant

Gorges' Edmond Howard.

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THE
P R E F A C E
TO
The R E A D E R.

WHEN I first began the following Treatise of the Law and Equity Practice of the *Exchequer in Ireland*, I had not the least Notion of communicating it to the Public; I wrote it only for my own private Instruction, and to fill up the many leisure Hours I had on my Hands, at my first Entrance upon my Profession; nor should I now have ventured to publish it, but that I have been persuaded, that it may be of some Advantage to Beginners, and to the young Gentlemen who are now bringing up to the Profession of an Attorney, but more especially, in Hopes that it may stir up some Person, more capable than I, either from my Knowledge or Experience, can pretend to be, to improve on it, and at length to compleat what is so much desired, and so much wanted, some certain settled Practice of the Court, by which its Members may be governed; and at the same Time, that I thus wish the Practice of this Court settled, in such a Manner, and on such a Footing, that every Attorney and Practitioner, may know with certainty what the Practice is, and as such depend upon it; I could also wish, that some Regularity was settled

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and established, as to the several Members of the Profession, so as to restore them to that Degree of Credit and Value, which a Profession so useful, and so necessary in Society, and without which it could not do, ought to have, and as Gentlemen they are entitled to.

I will therefore humbly submit to the Public, some Reflections and Observations of my own as to this Profession, which I flatter myself may, if considered, be of some Service and Advantage to it.

It must be confessed, and cannot be denied, that an honest Attorney is a necessary, useful, and valuable Member of Society, and is such a Person as the Public cannot be without, unless we can restore the golden Age, and take away all Injustice and all Vice from Mankind; but as this is a Thing much easier wished for, than compassed; in the mean Time there must be unavoidably such a Profession in the Community as that of an Attorney, at least, while there is any such Thing as Property, Trade, or Dealing among Mankind. Is not an Attorney often intrusted with the Defence of the two most valuable of temporal Things, our Lives and Properties? And has he it not as often in his Power to injure the latter, nay, to destroy them both? Is it not then extremely well worth the Consideration of the Legislative Power, to regulate a Profession of so great Consequence to the Public, in the best Manner it is capable of.

The first and most capital Grievance to the Public in this Profession, is the Number of the Members of it. The Business of the Kingdom, is not near sufficient to keep one Half of them from starving;
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then what must be the Consequence? Why, if they have not a Property sufficient to maintain them without Business, (which I am sorry to say is too often the Case) Champerty, Barretry, and eternal Petty-fogging, must be propagated wherever they are dispersed.

The next Thing to be considered, is their Qualification; and this is a Matter of the greatest Consequence, to be considered in the admitting of Members into this Profession. Let him be who he may, who is so admitted, he is from that Instant denominated a Gentleman, and is entitled to that Character by Prescription, and from Time immemorial: Then before this Character is so bestowed on him (than which none is more valuable) should he not be in every respect, qualified to receive it? Undoubtedly he ought. He should have a competent Fortune to enable him to appear as a Gentleman, and to support him in that Station, until he comes into Business. (For it is well known, that a young Attorney is at first but rarely employed.) He must have decent Chambers, he must dress clean and decently, and be enabled to keep Company in a reasonable Way. In what Condition, then, must he be, who in the Beginning has not Six-pence to maintain him? And that this is most unfortunately the Case too frequently, daily Experience evinces beyond all Controversy, why, unless he has uncommon Friends to support and assist him, he must run in Debt for even the common Necessaries of Life; and in order to procure some small Livelyhood, he must cast about for some little Business, and unless he be endowed with Virtue enough to lye down and starve, he must do many little Things in order to acquire it. Then, many of them from their Poverty, are under a Necessity of

settling in the Country, to the absolute Ruin and Oppression of the lower Kind of People, and the embroiling of whole Countries. In short, it is letting out a Drove of Wolves and Tygers to devour Mankind; for it is unknown, what Mischiefs an evil-inclined Attorney can produce, and create in the Neighbourhood he dwells in; he has this Advantage of the rest of Mankind, that he can torment, perplex, and impoverish, without being himself at any Cost or Expence, nay, sometimes to his Gain and Profit.

If no Man was to be admitted of the Profession, who did not make it appear by Affidavit, that his Father was possessed of a Property in either Land, or Money, of the clear Value of 2000*l.* at least, or that he had in his own Right, an Estate or Income of at least 40*l.* a Year, or was possessed of at least 500*l.* in Money; so that he might be in some Sort, enabled to live till he got into Business; I say if this was to be a Rule in the Admission of Attornies, their Numbers must of course in Time be greatly diminished, and by a Method so gentle, as no Man could complain of; and especially if a Law for this Purpose was not to take Place, until after five Years from the making of it, by which no Man could possibly be injured. It would prevent a Multitude of vexatious, frivolous Suits, it would take off that Odium so generally thrown upon a Profession, which (if properly managed) would, as I have before said, be most useful and valuable to Society, and would, in all human Probability, bring the Business of the Courts into the Hands of Men of Education, Character, and Credit. And I will say, if such a Law was so settled, as not to be got over, or evaded, the Suitors, and the Subject in general, would soon find their

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their Benefit in it, and Gentlemen of Fortune would be quickly induced to breed up their younger Sons, to so valuable a Profession.

I could also wish, that none were to be admitted but Men of known good Characters, and well qualified. Now, it is well known, that hackney Clerks, are in the general, of the meanest and lowest Ranks and Degrees of the People, and yet (to the shame of the Profession be it spoken) it is too common a Practice, for Attornies to take them as Apprentices to them, in Consideration of their Writing for them at a low cheap Rate, or from some such mean Consideration; then, when this Sort of People come themselves to be sworn, they proceed in the same mean Way their Masters did, so that it is not to be wondered at, that the Profession is brought to the poor State, and the low Ebb it has been in for many Years, as to its Repute and Credit in the World. Suppose then, that a general Order should be made, that no Attorney should take any Person as an Apprentice, but by the Approbation, and with the Leave of the Court, and an Order to be conceived for that Purpose, upon a Petition to be read in open Court, in which the Name and Age of the Person, his Parents, and their Situation and Circumstances in Life, Profession, or Method of Livelihood, should be set forth in a very full and particular Manner.

Then, in order to their Qualification, suppose some particular Time in every Year, should be appointed for the Examination of Candidates, and it should be a very solemn, public, strict, and regular Examination, and one of the Judges of the Court to be always present, as also, all the Officers of that Court, and each Person before the Examination, to

produce a Certificate from the Attorney he served, not only of his Service, but of his moral Character. This would soon make young Gentlemen extremely careful and cautious of their Conduct, during their Service as Apprentices, and careful in improving, and qualifying themselves for such an Examination, where they could only succeed by their Qualifications, Abilities, and Merit; and it would raise among them such a Spirit of Emulation, as would bring the Profession into such Credit, that it would not be the least Dishonour for any Gentleman whatsoever, to have been bred a Member of it; whereas at present, it is held in the greatest Contempt, and the Members of it, subject to the daily Insults of even the meanest of the People.

There is another Misfortune attends this Profession, and in some Measure helps to bring on it the Contempt it so unjustly labours under, and that is the Ignorance of several of its Members, of almost every Branch of Literature. It is too true, that many of them not only know nothing of the Law, but (strange to hear,) it is even thought, that they have no sort of Occasion for any Degree of polite Learning; it is enough, (say they) if they can write and read well, and understand *English*. A Doctrine as absurd, as it is false: For in the first Place, if the *English* Language, as it is now settled, be beholden (as it is undoubtedly) to several other Languages, for most of, if not all its technical Terms, or Words of Art in almost every Science, and also for most of the other Words in it, except the Monosyllables; I do pronounce it as a Thing impossible, for a Man to be ever a Master of it, unless he understands the several Languages from which such Words are derived, and it is as impossible that he should ever either

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ther write or speak with Justness or Propriety. The Act for turning all the Law Proceedings into *English*, was a deadly Stroke to Learning, besides, in some Years hence, the *Latin* Records will neither be legible nor intelligible.

But how must such an Attorney, thus ignorant of Law, and all Manner of Learning, prepare a State of his Client's Case, and especially where Matters of Law are in Question? Why a common Porter or Keeper of the Courts who can read and write, is as well qualified; for the Knowledge of the common Rules and Practice of the Court, is of no sort of Use in this Respect, and the meanest of Creatures, with a little Attention, may, in a very short Time, be as much Master of these, as many of such illiterate Members of the Profession are during their whole Lives. A Man entirely unskill'd in Architecture, may as well pretend to draw the Plan of a Palace, or a Person quite ignorant of the Mathematicks, to frame a Problem or a Proposition in them, as such an Attorney the State of a Case.

But suppose it should happen, that such an Attorney should make a Fortune to enable him to retire from Business, (happen I may well say, for nothing is more rare in this Kingdom) I can't conceive any Amusement he could find for himself, in his Hours of Solitude, or any Conversation for his Company when in Society; the most knotty Quirks and Quibbles of the Law, or the most notable Points of Practice he ever conducted, would not be the least Entertainment to any rational Being; and I am sorry to say, that even in the genteeler Part of the Profession of the Law, the Study of polite Literature, has not in our Days been near so much attended to, as I could wish it were.

*Adde quod ingenuas didicisse fideliter Artes
Emollit mores, nec finit esse feros.*

In Lord *Bolinbroke's* Letters on the *Study of History*, I met with the following Lines, which, although they contain in them a Satire on the Profession of the Law, and a Censure far more rigid than the Truth will bear, as there are several Gentlemen of the Bar, both in *England* and in this Kingdom, who, for their Ingenuity, Learning and Candour, are Ornaments to the Kingdoms in which they live; yet they are in the general so pertinent to the present Subject that I must insert them here: "I might in-
" stance (says he) in other Professions the Obliga-
" tions Men lie under of applying themselves to
" certain parts of History, and I can hardly forbear
" doing it in that of the Law, in its Nature the
" noblest and the most beneficial to Mankind;
" in its Abuse and Debasement, the most Sordid
" and most Pernicious; a Lawyer now, is nothing
" more; I speak of ninety-nine in an hundred at
" least; to use some of *Tully's* Words, *Nisi Legu-*
" *leius quidam, cautus et acutus, Præco Actionum,*
" *Cantor Formularum, Auceps Syllabarum.* But there
" have been Lawyers that were Orators, Philoso-
" phers, Historians: There have been *Bacons* and
" *Clarendons*, my Lord: There will be none such
" any more, till in some better Age, true Ambition,
" or the love of Fame prevails over Avarice;
" and till Men find leisure and Encouragement to
" prepare themselves for the Exercise of this Pro-
" fession by climbing up to the vantage Ground,
" so my Lord *Bacon* calls it of Science, instead of
" grovelling all their Lives below, in a mean but
" gainful Application to all the little Arts of Chicane:
" Till this happens, the Profession of the Law will
" scarce deserve to be ranked among the Learned
" Professions,

“ Professions, and, when ever it happens, one of
“ the vantage Grounds, to which Men must climb,
“ is metaphysical, and the other historical Know-
“ ledge; they must pry into the secret Recesses of
“ the human Heart and become well acquainted
“ with the whole moral World, that they may
“ discover the abstract Reason of all Laws; they
“ must trace the Laws of particular States, especial-
“ ly of their own, from the first rough Sketches
“ to the more perfect Draughts; from the first
“ Causes or Occasions that produced them, through
“ all the Effects good and bad that they produced.”

I believe I may safely venture to say, that there is no Profession in Life, where such Respect is paid to Excellence as in the Profession of the Law; it is even to a Degree of Adoration, and especially when it is attended with an equal Degree of Candour, Truth and Honesty: And, as a Proof of what I say, I have even in my small Experience often seen some Persons possessed of these Advantages, who have been Courtied by Men to become their Advocates by such prodigious Sums, as deserved the Name of Bribes much rather than of Fees, and who at the Time of receiving them have not shewn the least Countenance of Thanks, but have even spurned at the Giver.

These most engaging, nay, these most bewitching Encouragements, have made me wonder that there are not many of this Profession more eminent than there are, or that so many as are daily seen in the Halls of the Courts, can bear to follow this Profession, until they are grown quite grey in the Service, without having ever earned wherewithal to pay even the Rents of their Chambers; for of all the Professions
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in life, the want of Business in this, after any length of Attendance, is nineteen times in twenty an infallible Sign of want of Eminence : And one Advantage the Gentlemen of this Profession, and the Professors of Physick have above all others, is, that, let the Degeneracy or Corruption of the Times be what they will, whilst the Security of Health, and Property is an Object of the Attention of Individuals, the ablest, and most eminent Lawyers and Physicians will ever be at the head of their Professions.

And yet, (but that a single Instance never can destroy a general Rule, or an universal Observation) I could overturn the whole of my own Argument in the Instancing of one Gentleman of this Profession, whose Knowledge in it is as consummate as his Virtue and who is possessed of every Virtue under Heaven ; and yet he has followed this Profession with unwearied Application and Attendance for a Course of many Years, without getting (I may venture to say) the twentieth Part of what his Merit deserved. He also for as many Years hath filled a Seat in Parliament, where, if, any have equalled, I believe it will be allowed me by all to whom he is known, that few have excelled him in the Knowledge of the Law, and Constitution of his Country, and in the strictest Honour, Truth, and honesty of Heart, and yet has never had either any Employment given him or any Place of Trust or Honour in the State. I itch to name him, though I think I need not, and fear it would offend his well known Modesty too much.*

That any Member of so exalted a Profession as this, shall, for a Guinea, prostitute both Truth and

* *Thomas Lehunte, Esq;*

Honesty,

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Honesty, and endeavour to make that appear to be Right, or Law, which he at the same Time knows to be entirely otherwise, or to impose upon the weakness of a Judge, or mislead a Jury, to the prejudice of the Property of perhaps some honest Man, and the total Ruin and Beggary of him and his Family, are Matters scarcely to be conceived ; and yet that such Things have happened, is known to every Person that has attended the Courts : But how a Man who has behaved thus, can afterwards go home and sleep, must be Matter of very great astonishment to every honest Man.

Then, to be present at the Examination of a Witness by some of the Smarts of the Profession here ; you shall see a poor unfortunate Man, who is summoned to attend and give his Testimony, and who was perhaps never in the presence of a Court before, with three or four of these attacking him at once, in as bad a Condition as a Bear or Bull at a Stake, a thousand little Schemes and Artifices used to torment and torture him, and to perplex, confound, and overturn the whole Memory and all the Understanding he has, thereby to lead him into Inconsistencies and Contradictions ; Words put into his Mouth or said for him that never entered into his Thoughts, as thus, “ and so, Sir, you say ” and such like ; and the whole wrested by all the Art of little Cunning, Chicanery and Sophistry, to the Prejudice, and in open defiance of all Justice, Truth, and Right : It is much to be wished that in such Cases it were better known than it is, that Lawyers have no right to put the Questions to the Witnesses, that they only have a right to Propose them to the Court, and the Court to put them to the Witnesses.

If

If therefore this Study of polite Literature, recommended by Lord *Bolinbroke* was attended to more than it is, nothing would be then more difficult than to get a Gentleman of the Profession to undertake the Defence of a Cause which he knew could not be defended, or to endeavour to mislead a Witness, or deceive a Court and a Jury, by Chicanery, false Reasoning and Misrepresentation of Facts; or to take an exorbitant Fee from a wretched Client and keep it, though he never do him the least Service for it; for he would then know that such Things are beneath the Dignity of a Man, and inconsistent with Virtue, the highest Perfection of human Nature; but above all, that it is an Offence to that Almighty Being, who is the Fountain of all Justice, and knows the very Thoughts of our Hearts.

Now, I would by no Means be understood to have intended any Thing in this, as a Reflection on Attornies in general; for I know there are many Men of as much Worth and Honour, in this, as in any other Profession, or among any other Set of Men whatsoever; and the Profession itself is far from having any Vice in it as a Profession: I am sorry, I cannot but say, there are some evil Members in it; but, I believe, every one must allow, that, considering their Number, and the many Temptations* they are ever subject to, they are extremely few; and it is very unjust, and most severe, to throw an absolute Contempt and Odium upon a whole Profession, because there are a few evil Individuals among its many Members: Were this to be the Case with the

* There is one Temptation among others which is a Rock on which Numbers have split, and that is that their Receipt will be a Discharge for any Sum for which they sue. This has been the ruin of many an Attorney, and of many a Suitor.

other Professions in Society, I know not any would escape, but let their Crimes be as bad, as any Thing an Attorney can be guilty of, yet they are too often passed over or buried in Oblivion, whereas, if a poor unhappy Attorney, among the many Temptations he is surrounded with, makes but one false Step, though perhaps drove to it by the deepest Poverty, he is brought in Triumph to the Bar of the Court, and if the Fact be proved on him, his Gown is pulled over his Head, and like the meanest of Vagabonds, he is cast over the Bar, with his Offence wrote in large capital Letters on his wretched Back; by which Punishment he is so stigmatized, that although he should afterwards become the best of Men, yet this Mark of Infamy will stick to him for ever.

Then he is at all Times, subject to the Caprice and Humour of a Judge, who, should he happen to be peevish, may, without the least Reason, with one Blast of his Breath, for ever ruin him in his Business; for, even the Character of a Woman is not more delicate or tender than that of an Attorney; the least false Step, entirely and irretrievably for ever damns the Fame of them both: *Julius Cæsar* used to say, that it was not sufficient for a Woman to be virtuous, but she must even avoid all Causes of Suspicion; such is also the Attorney's Case; and yet it has happened, that, perhaps, for some little Slip or Neglect, which the best might have been guilty of, he shall be treated with such Language, in an open full Court, that he had much better have been dead, than to have stood the Shock of it: And although we are now blessed with a Set of Judges of Learning, Integrity, Politeness, and Humanity, yet that there have been Judges, who have not been so eminently possessed

possessed of these Qualifications, several Persons, now living, to their Cost can testify.

*Who steals my Purse, steals Trash, 'tis something
nothing;
'Twas mine, 'tis his, and has been Slave to Thousands.
But he that filches from me my good Name,
Robs me of that, which not enriches him,
And makes me poor indeed.*

SHAKESPEAR'S *Othello*.

I think there is not in the Creation, a more glorious heavenly Sight, than an upright, patient, knowing Judge, sitting in Judgment: If ever Man had the Likeness of his Creator, it must be in that Situation. I therefore recommend it to every Judge, that whilst he continues in the Station, he does at least once a Month, read over most carefully, the Preface to Lord Chief Justice *Hales's* Pleas of the Crown: It cannot be too often read.

The People of *England*, have one great Advantage in regard their Judges, they are there seldom taken from the Bar, and placed on the Bench on account of their Interest or Abilities in the House of Commons. The Gentlemen of this Profession in *England*, are but of small Consideration in the House, when compared to the Country Gentlemen, who excel them far, not only in the Knowledge of the Constitution, but in Oratory also. Here, few others but the Lawyers speak in the House. Now, should it ever come to pass in this Kingdom (which God forbid) that Judges should be made for no other Reason, but to take them off (as it is usually termed) in what a wretched Condition should we be as to every Thing in Life that is dear to us, our Lives,
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our Liberties, and Properties? It is enough to make one shudder to think of it. Therefore, it is to be wished, we may never want at least, one *Englishman*, knowing in his Profession, and honest withal, a Judge on every Bench. Add to this, that they may be supposed to be free from Connections here, in which we should have the Advantage of the People of *England*, for to have Connections, and be quite unbiassed, is as much as Man can do.

But to return: When an Attorney is found guilty of any evil Act, it is fit he should be punished, and in an exemplary Manner; but then it should first be fully proved against him: However, I believe there is no Person who will not allow, that it is far better to prevent Mischief, when it can be done, than to have Occasion to punish the Offenders; besides, Attornies, and especially the evil Members of the Profession, are in the general, excessively poor, and no adequate Remedy to be had where Life or Property is betrayed by them, or by their Corruption lost.

I have not here set forth even the one Half of the Disadvantages, Hardships, and Severities a poor Attorney labours under: If by his Care, Industry, and Zeal for his Client, he succeeds in the Cause, it often happens that the opposite Party, not only becomes his bitter Enemy, but endeavours all in his Power, to calumniate him, and traduce his Character; and it sometimes happens, that the very Client he has so well served, shall never pay him Six-pence of his Bill; or if he does, it is grudgingly, and of Necessity. And if he miscarries, though, perhaps, in no Sort to be blamed (for both Parties cannot have the Right) he is often not only not paid, but perhaps treated with Indignation, and Reproach; and yet no
Man

Man earns a sordid Livelyhood so hardly; for his Fees are the same now, they were some hundred Years ago, when a Penny would have purchased near as much of Life's Necessaries, as Six-pence will now. In a common Law Suit, he has but 2*s.* 6*d.* Term Fee; and, for this, he is under an indispensable Necessity of attending the Court and Offices every Day, whilst the Term lasts, and to run of many Errands and Messages to Lawyers and others, too tedious to enumerate; in short, by the common Fees he has not Porter's Hire, nay, not half a Farthing for each Errand and Journey he is unavoidably compelled to take; he has also but 2*s.* 6*d.* for attending a Motion, or a Law Argument, which may be several Days in Readiness before they are called on, during which Time, he is to attend the Court constantly the whole Morning; he is allowed but one Shilling in the general, for drawing an Affidavit, and the taxed Fee upon issuing a Writ, is but 2*s.* 6*d.* out of which he is to pay 6*d.* for signing it, and 6*d.* for sealing it, and this at different Offices, where he may attend several Times, before he meets the proper Officers, as they are not, in the public Offices, obliged to certain Hours of Attendance; so that for all this, and for engrossing the Writ, and for the Use of his Name, and Profession, he has 1*s.* 6*d.* Profit. And of all these sorry Articles, he must make Entries in his Books, and from thence draw them up afterwards into Bills of Cost, then copy them for his Clients, and often afterwards be obliged to attend the taxing of them, Times innumerable, all which, with the many Letters he is under a Necessity of writing, the three Post Days in every Week (and for which, in this Kingdom he is not allowed to charge any Thing) I will answer for it, do at the least take up one Third of his Time.

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For these Reasons it is, that Attornies undertake many more Suits than they are able to go through, for I do insist upon it, that three or four *Chancery* Suits of Consequence, in Prosecution at the same Time, and carried on with Spirit, are as much, if not more, than any Attorney or Agent can properly conduct; and yet perhaps some have forty to manage; but what can they do? If they were to refuse any, they may, when those they have on Hands (by which they only get a beggarly Subsistence) are finished, want Bread: And I believe there are but very few who could endure to labour hard and starve.

Then, in the generality of Employments, the Care and Anxiety of Business ceases with the Business, and the Business with the Day; nay, in many of them, the whole is over long before the Evening comes on; whereas an Attorney of any considerable Business, cannot call a Minute his own, or insure himself a Moment's certain Ease and Rest, either Morning, Noon, or Night, and if at length he is obliged to commence a Suit to recover, not only the Money due to him from his Labour and Pains, (which are much greater than those of a Galley Slave chained to an Oar) but also the Money he has expended in Fees to Council, and to Offices (the Interest of which, have often in common Law Suit amounted to almost as much, as his sorry Fees have amounted to) by a late Act of Parliament, he is to give his Client a Month's Notice, to remove himself with his Effects, and is to go through so many tedious strange Forms, and to encounter so many other, almost insuperable Difficulties (some of which are mentioned in the Heads of a Bill, for the Amendment of the Law in this Particular, which are set down at the End of this Preface, and are humbly submitted to the Consideration of the Legislature.)

that he had better give up his whole Demand, than go through the Half of them. And then, he is the only Member in Society, the Price of whose Labour has not been encreased from the Change of Times, and the great Decrease in the Value of Money.

It is now upwards of twenty Years since I became a Member of this Profession, and I can with Safety say, that I have not in that Time known, or heard of three Men, who by the Profits of the Profession only, have made, what a Man may call a reasonable Fortune: It is true, several Attornies have made Fortunes, but it must have been by other Means, never by the bare Fees an Attorney is entitled to; for I defy any Man to earn at his Business only, and let his Bills of Cost be taxed, upon an Average, taking one Day with another, and let him work from Morning till Night, above 500*l.* a Year, and I have allowed most largely; and I believe, every Attorney in the Courts, would compound (as they are now treated) if they received two Thirds of what they earn in the Year: And as for Acts of Generosity from Clients, the Age we live in, is arrived to such a Pitch of Luxury, and Extravigance, that very few leave it in their Power, to be either generous or grateful, it is very well if the can be honest.

I remember I brought in some Bills of Cost to a Nobleman in *London*, for whom I have the Honour to concerned as Attorney and Agent in this Kingdom; they were for several Ejectments I had brought for Non-payment of Rent on his first coming into the Possession of his Estate here; he kept them for some short time before he paid me, and when he did, he gave over and above my demand a very genteel Present, and told me, he had shewn my Bills of Cost to his
Attor-

Attorney in *London*, who said, *Ireland* must be a very cheap Place if I had Salt to my Pottage from what Profits I had on these several Ejectments, which, in the general, are as beneficial to an Attorney as any Business at the Common Law. And I really do not recollect to have Experienced two Instances more of such Generosity ever since I have drudged at this slavish Profession, and I believe it is well known I have had no small share of Business in it.

If an Attorney was qualified, as he ought to be, he should be a Man of unblemished Character, and of credible Parents, he should at least, have a complete School-Education; he should be tolerably well read in the Laws of his Country of every Kind; he should have an Income at least, sufficient to support him until he comes into Business; he should be versed in some Branches of the Mathematics, and especially in Geometry, as several Questions do frequently arise about the Mears and Bounds of Lands, in which a Knowledge in Surveying might be materially useful, he should be a perfect Master of Figures and Book-keeping, as most of the Suits in the Court of Equity, are upon Matters of Account: And I will venture to insist, that, for many Reasons, no Man is so fit to be a Receiver to an Estate as a Man who is acquainted with the Laws; for if he be an honest and a skilful Man, he will preserve his Landlord from many frivolous Suits; besides, he is an Awe to the Tenants, who will consider that their Litigiousness must, at all Events, be their Loss, and his certain Profit; and I have myself heard many Tenants openly confess it: Were Attornies to be thus qualified, and their faithful Services and extreme Labour properly considered, and with Honesty and Gratitude rewarded, it would soon
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bring the Profession to such a State of Credit and Esteem as to be an Ornament, instead of a Reproach to its Professors, and so far from being a Scourge (as Wits have termed it) be a Blessing to the rest of Mankind.

Upon the whole, I most sincerely wish that something may be done, to restore this Profession to that Credit, to which it is so justly entitled, to make it, as it was undoubtedly at first intended, and as it ought to be a real Use and Benefit to the rest of Mankind, and to reward its Professors in a reasonable Way, for their Honesty, and their extreme Industry, and Labour, the last of which is not to be equalled in any other Business or Profession, in the whole Community. And to effect this excellent Work, the Society of the *King's Inns* have a great deal in their Power, as have the several Judges in their respective Courts; as may appear by an Act of Parliament I have hereafter inserted. The several subordinate Members of the several Courts, I mean the Officers and Attornies may be also greatly instrumental, and a considerable Assistance to their Judges, on this Occasion, as also, in Matters relative to the Practice and Execution of the Law, by representing and remonstrating to them such Things, as by a long Course of Experience have appeared to them, and have proved to be of real Mischief and Inconvenience to the Suitor and the Subject. And for this Purpose, to have Meetings on the Day after every Term, at the chief Office of each of the Courts. And as for such Grievances, as the Parliament only can redress, there can be no Doubt but these would be speedily taken into their Consideration, if represented to them, by so learned and so considerable a Body, as the Society of the *King's Inns*.

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By the Stat. 4 Hen. 4. ch. 18. All Attornies shall be examined by the Justices, and by their Discretion put into the Roll; those that are by them approved of, shall swear truly to serve in their Offices, and to make no Suit in a foreign County. An insufficient Attorney, shall be put out by the like Discretion of the Justices, and their Masters and Clients shall have Notice thereof, lest they be prejudiced thereby. As any die, or cease, the Justices shall appoint others, being virtuous, learned, and sworn, as aforesaid. If any Attorney be found notoriously in Fault, he shall forswear the Court, and never be admitted into any other Court. The Treasurer and Barons of the *Exchequer*, shall pursue the like Course at their Discretion.

Now, by this Act, the Power of the Judges is extremely extensive, as to the Admission and Regulation of Attornies, and also as to their Qualifications, as well in Regard to their Abilities, as their moral Character. It also seems, by this Act, to be in the Power of the Judge, to restrain the Number of Attornies: Could this be but effected, it would be a considerable real Benefit to the whole Community.

By Stat. 3 Ed. 4. ch. 2. All Clerks and Attornies in every of the King's Courts, shall take but 12*d.* or under, for their Fees, in every Plea by Writ or Bill; and for the Copy of every original Writ, only 4*d.* or under, and for the Copy of other Bills and Records, by the Discretion of the Judges, where the Matter depends.

If any Clerk, Attorney, Keeper of Writs or Records aforesaid, take more, or refuse to be Attorney (if not retained on the contrary Part) or refuse the

Copy of an original Writ, Bill, or Record, as a-foreſaid, then to forfeit to the Party grieved, one Hundred Shillings for every Time he offends therein, and to be forejudged the Court in which they are.

This laſt is the only Statute Law, or other Law that I can find, relative to the Fees of an Attorney; and this Statute was made almoſt three Hundred Years ago, and notwithstanding the Change of Times, the Encreaſe of Trade, the Decrease in the Value of Money, and the high Prices which Proviſions bear, and all other Neceſſaries of Life of every Kind, yet theſe poor ſorry Fees do ſtill remain the ſame (which is not the Caſe in any other Buſineſs in Society) and (as I have before ſaid) are frequently not paid, or paid with Reluctance, too often with the greateſt unprovoked Diſpleaſure, and yet, until Mankind ſhall think fit to be better than they are, there muſt be Laws, and if ſo, there muſt be Judges, Counſellors, Attornies, and Bailiffs, and without them, there would be no living.

As I have now ſaid every Thing I can think of, relative to the regulating and reſtoring to Credit the Profeſſion of an Attorney, I ſhall beg Leave to Trepasſ yet a little further on the Patience of my Readers, in pointing out ſuch as have occurred to me, of the many grievous Abuſes, Errors, and Defects, which from Time to Time, have crept into the Practice and Execution of our Laws, and which are now grown to ſuch a prodigious Height, and eſpecially in the inſufferable Delays, and the heavy Expence which attends the Proſecution and Purſuit of Juſtice, that unleſs the Matter in Queſtion, be ſomething very conſiderable, it would be far more prudent for a
Perſon,

Person, even to forego his Right ; than assert or defend it, in any Court of either Law or Equity.

From hence Occasion has been taken, to censure and condemn the Laws, in themselves, the wisest and the best that ever were framed, for the Benefit and Advantage of a Community. It is not in the Power of human Wisdom, to contrive an Institution, on which the Invention of wicked Men, may not graft evil if they will. And how can we expect it should be otherwise with any Laws that Man can frame, and that they shall not be misconstrued and abused, when even the divine Laws themselves, dictated by the very Spirit of God, the Source and Fountain of all Wisdom have not escaped. But whenever these Grievances are manifest, it is the Duty of the Legislative Power of every Society, to do every Thing that can possibly be done, to redress, and prevent them for the future.

The Laws of Fines and Recoveries for the docking of Intails, the Prevention of Perpetuities, and the Circulation of Property, were wise Contrivances for the Promotion of Industry and Trade; but in the Proceedings therein, there are so many strange and expensive Forms and Ceremonies founded all in Fiction, that it is an amazing Thing, that for so many Ages they have been suffered to exist.

It would scarce gain Credit, were it to be told in any other Country, that in so wise a Nation as *England* is, the common, nay, the principal Assurance of their Lands is transacted by a Parcel of Fictions, and by bringing the Proprietor of the Estate to the Bar of the Court, and placing him as a Mute in the midst of three Barristers at Law, who, the better to

compleat the Scene, are denominated Counters, and are to gabble round him a Heap of Nonsense, only fit for *Hottentots*, quite unintelligible to the very Persons who utter it, and to every one who hears it.

Suppose a Deed was to be executed by the Tenant in Tail in Possession, and duly registered, declaring the Fee of the Estate to be from that Time vested in him, and this to be substituted by the Legislature, in the Place of the present intricate Method of cutting off Intails, with a Proviso that no such Deed shall be given in Evidence, until all Fees payable at present to the Crown, are satisfied and paid into some proper Officer, to be appointed for the receiving of the same, and a Certificate thereof to be indorsed on the Deed, and attested by the Officer for that Purpose,

But of all the Grievances in the Abuse of our Laws, there is not one in any Degree equal to the Writ of Error. The determining of our Property by the Verdict of twelve Men, all of our own Rank and Station in Society, is reckoned one of the greatest Bulwarks of that glorious Liberty, which we, above all other Nations, boast to enjoy; and yet after a fair Creditor has gone through all the Ceremonies and Forms of perhaps a tedious Suit, and has been at great Expence and Trouble in proving his Demand, for which at length he has obtained a Judgment; if his Adversary is still inclined to harass him more, and to prevent his having the Benefit of this Judgment, he is only to bring this Writ of Error, and if his Lawyer or Attorney, or even the Officer of the Court, have happened to commit some trifling Mistake in any of the Proceedings

ings (for nothing of the Merits of the Cause, is ever in the least in Question) such as by Writing, *shall recover*, instead of *do recover*, (for this I remember a Matter long contested on a Writ of Error) why, the Judgment is hung up for Years, the fair Creditor, all this Time kept out of his just Demand, fairly recovered, and if the Errors assigned shall be allowed, the Judgment is reversed, and he is again set to Sea, with the Loss of perhaps double his Demand, in the Expence he has been put to. And if the Judgment is affirmed, and Costs awarded him, perhaps this Cost, notwithstanding the Statute, 9 Will. 3. ch. 35. may not be one Half of what he really has expended on this terrible Proceeding, and the other lost Half, may be double the Value of the Debt he sued for. But what is still more grievous, this Writ of Error may be brought at any Time within twenty Years after the Judgment, when perhaps a Man's Witnesses are rotten in their Graves; and if there be any Incapacities in the Case, it may be, that they shall be brought in thirty or forty Years after the Judgment; for by the Statute 6 Geo. 1. ch. 6. for restraining the Time for bringing Writs of Error, notwithstanding the twenty Years are expired, yet, the Person under any of the Incapacities mentioned in that Statute, is to have five Years after it is removed, to bring his Writ of Error. And, altho' it be true, that the Statutes of Jeofails have in a great Measure, remedied the Evils attending the Frequency of Writs of Error, by helping in many Cases the Errors and Defects, by mispleading in Records, Process, Misprision of Clerks, &c. yet it is as certain, that Writs of Error, may still be brought for Matters not aided by those Statutes, as trivial as any that are expressed in them, for Instance, the Case I have before mentioned.

However

However it gives me Pleasure, not to be expressed, and it is much for the Honour of the Law, that the Doctrine of special Pleading, with all its horrid Heap of barbarous Jargon, has almost made its *Exit*, and that our Courts of Justice do Discountenance, as much as possible; the expensive terrible Delays, which frivolous and vexatious Demurrers, and dilatory Pleas produce, no Way relative to the real Merits of the Cause, and founded only in Injustice, Mischief, and Oppression. It is also much to be wished, that some Method was contrived effectually to prevent those unwarrantable Motions, which sometimes happen among the few contentious Attornies of the Court, about little Errors, Neglects, or Slips in Matters of Form, and in Points of Practice, by which, the unhappy Clients are put to a considerable Expence, (for the Cost always falls on them) and their Suits unreasonably delayed by these Brangles and Disputes, than which nothing is more foreign to the real Merits of the Cause, and the Attornies only profited. Now, if whenever this happens, the Court would not only censure the Attorney, in whom this litigious, terrible Spirit appears, but compel him to lodge in Court forthwith, out of his own Pocket, such a Sum as would answer all the Cost, expended by the opposite Party, to be made appear by Affidavit, and at the same Time, to order him at his Peril, not to charge his Client with any of the Costs on either Side, this would put a speedy Stop to it; and would in a great Measure, prevent the little sorry Advantages or Snaps (as they are termed) which some of the Practitioners of the Courts, too often take of each other, in the Practice, in Points of Time, and Form. In the Court of *Chancery*, no one Step can be taken against the opposite Party, but upon full Notice given, which makes

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makes the conducting of the Business there, extremely satisfactory, and to say the Truth, many of the Gentlemen Practitioners in the other Courts, do, in all Cases, pursue this Method, though by the present Rules, they are in many Cases not obliged to do it.

It is also much to be wished, that in all Cases, where several Acts of Parliament are in Being, relating to the same Subject, that they were reduced into one Law, for they are already grown so numerous, and so extremely voluminous, that a Man would require a hundred Heads to retain but one Half of them.

And then, as to our Decrees in Equity for the Sale of Lands, surely it is well worth the legislative Power, to consider of some Means for assisting them, and remedying the many Inconveniencies, and Defects of Justice, which so frequently happen from Plaintiffs, or Purchasers, not having the legal Estate in them, by the Defendant or others refusing, or being incapacitated, to join in the Deeds of Conveyance, or otherwise; so that it may, and has often happened, that a Person who has an Incumbrance upon an Estate, after a tedious and expensive Suit, shall be in no better a Condition than when he first began it.

By a Statute made in the 8th Year of his present Majesty's Reign, on any Ejectment, Distress, or Action for Rent, if the Tenant files a Bill for an Injunction, it shall not issue for Want of an Answer, unless the Plaintiff shall verify by Affidavit, the material Allegations of his Bill. This is a good Law, and I see no Reason why such an Affidavit should

should not be in all Cases where Bills are filed to stop Proceedings at Law, as five in six in of them are calculated merely for Vexation and Delay; besides, the salutary Intentions of a Court of Equity are too often, on this Occasion, most abominably abused, in screening and protecting the Persons and Effects of dishonest knavish Debtors; and the honest fair Creditor, by this iniquitous Abuse of the best Design, is kept out of his lawful just Demand, very often a considerable Time, and sometimes, perhaps, for ever; and, that this is most true, every Day's Experience evinces.

In all Causes in the Court of *Exchequer*, when Witnesses are examined in the City of *Dublin*, they are examined by the Clerks to the Barons, and the Depositions, taken upon these Examinations, are kept by these Clerks in their private Houses. Now, it is well known, that, in many Cases, it is of the utmost Consequence to have these Depositions preserved with the greatest Safety, and that often a Person's whole Property shall depend upon them; and for this Purpose, they may be required even twenty Years after they have been taken. And yet, it is as well known, that heretofore there has been the greatest Negligence committed in preserving them; and upon the Deaths and Removals of these Examinators, they have, many of them, fallen into the Hands of Executors or others, who have not known their Use, and so have been destroyed and lost for ever. I believe two or three Fatalities of this Kind happened very lately; besides the Title Deeds of the Suitors are often lodged in their Hands, to be exhibited to Witnesses. In the Court of *Chancery*, they are preserved with the greatest Care, in a public Office, appointed for that Purpose.

Then,

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Then, as to the Qualifications of these Officers, both as to their Credit and Abilities, there is not any Thing, in the Business of the Courts, more worthy the Consideration of the Legislature, as in many Cases the Event of a Cause depends entirely upon the Depositions of the Witnesses. According to the antient Course of the Civil Law, the Examination of Witnesses was thought of such Consequence, that one of the Judges of the Court, himself examined, and formed the Interrogatories out of the *Libellus articulatus*, as he pleased. And no doubt, in our *Chancery* Proceedings, the Witnesses were formerly examined by the Masters, who sat in Court to inform the Chancellor of their Credibility, till Causes so far multiplied, and the Masters became so much employed in other Affairs, that they left the Examination of Witnesses to their Clerks, as the Barons of the *Exchequer* did to theirs, who from thence got the Name of Examinators, and from thence-forward the Judge did not, but the Council for the Party, whose Witnesses were examined, framed the Interrogatories upon which the Clerks examined. Now, should not such a Profit, be annexed to this Office of Examiner, as would make it worth the Acceptance, of Men of Credit and Abilities, and sufficient to enable them to live independant of any other Business? And to induce them to execute the Office themselves, and not to act by Deputies; and they themselves should be impowered to swear the Witnesses, as it would be a Means of expediting Business greatly, for, I am satisfied. and it is well known to be Truth, that the unreasonable Delays, so justly complained of in *Chancery* Suits, are often owing in a great Measure, to the Delays which have happened in the Examination of Witnesses.

There

There is a Practice in the Law Side of the *Exchequer*, of granting immediate Judgment on a *Scire facias* where two *Nibils* are returned, unless Time to plead be prayed at the very Instant that the Motion is made; which seems very extraordinary; the *Scire facias* was granted originally by Statute, and intended as a Notice or Summons to the Defendant, where a Judgment had been obtained above a Year, and the Plaintiff had neglected to sue out Execution, that the Defendant might have an Opportunity, before the Execution issued, to shew if the Debt had been satisfied. How has he then that Opportunity, if immediate Judgment be granted upon the Motions on the two *Nibils*, unless he is constantly to attend the Court, and watch the Plaintiff's Motions? For it is well known, that, in five Cases in six, the Sheriffs make this Return of course, and without the least Inquiry after the Defendant. And then, on the other Hand, by the Practice of that Court, the Mischief is in as great an Extreme, where a *Scire feci* is returned, as the Defendant has the same Time to plead to the *Scire facias* (although the Debt be absolutely ascertained by the Judgment) as he hath to a Declaration, where the Demand may be, and frequently is, vexatious, and without any Foundation: Which seems to be against all Manner of Reason, and may, and without Doubt in many Cases does, cause a perfect Failure of Justice; for, in that Court, there are three Rules to plead entered of Course upon the *Scire facias*, as well as upon the Declaration, each Rule containing four exclusive sitting Days in Term; so that a whole Trinity Term, in which there is generally a *dies non juridicus*, and which precedes a very long Vacation, may be consumed before the Plaintiff is entitled to his Judgment; and even then, the Defendant, if he be so inclined, may easily

sily prevent it, by putting in a frivolous Plea, on which the Plaintiff cannot join Issue, and so hang up the Matter until the next ensuing Term; in which Time, the Defendant, if his Fortune be but personal, may make off with all his Effects, and deprive the Plaintiff of his just Debt, which is a great Mischief to the fair Creditor, who hath obtained a Judgment against the Defendant, for the Debt which remains unsatisfied, but through Negligence, or perhaps Indulgence, has not sued out Execution within the Year, wherefore, by the Course of the Courts, he must bring a *Scire facias* to revive the Judgment. It is therefore to be wished this Inconvenience was remedied; suppose a Rule should be made, that on every *Scire facias* which issues to revive a Judgment, as well where two *Nibils*, as where a *Scire facias* is returned, (except it be against the Heir and Ter-tenants) the Plaintiff shall have absolute Judgment, unless the Defendant shall plead in four or six Days after the Motion for Judgment, (as it is in the Court of *King's-Bench* and *Common-Pleas*) and if the Defendant is to plead in Term Time, that his Plea shall not be received but by Leave of the Court, upon Motion, and producing to the Court upon such Motion an Affidavit of the Truth of his Plea; and that the Debt, and every Part thereof hath been paid or otherwise satisfied to the Plaintiff: And that in Vacation Time the Officer of the Court, shall not receive any Plea to such *Scire facias*, but upon the Defendant's producing such Affidavit as aforesaid.

And even on all Declarations in the Court of *Exchequer*, and upon *Scire facias* against the Heir and Ter tenants, the Time given the Defendant to plead is rather too great, and is more by several Days
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than is given either in the *King's-Bench* or *Common-Pleas*, and is often attended with the greatest Inconvenience, and extreme Injury to the Plaintiffs; for Instance, in the Case of Ejectments for Non-payment of Rent, where, by the unreasonable Time the Defendant has to plead, the Lessor of the Plaintiff may, and often does, lose a further Half Year's Rent, and especially, if the Ejectment be for Lands in the County or City of *Dublin*; for if the Defendant had not such a Length of Time to plead, as by the Statute he is obliged to plead the general Issue, the Plaintiff might have a Trial on the last *Nisi prius* Day in Term, or on the *Nisi prius* Day after the Term: Besides, in that Court, altho' the Rules to plead be run out several Days before the last Day of the Term, yet the Plaintiff shall not be at Liberty to move for Judgment upon a Certificate of no Plea, until the very last Day of the Term: And this, it seems, is the antient Practice of this Court, for which, I never yet could learn any sensible Reason, nor any other Reason from any of the Practitioners, but that it is, and has been so Time out of Mind. I thereby humbly submit it, if the Practice in these several Cases should not be altered, and without Loss of Time, as the Expedition of publick Justice, in a proper Way, is the Advantage of the Suitor and the Subject, and a public Utility, and should not be either obstructed or delayed by adhering, without Reason, to any old or groundless Modes or Forms of Practice.

I do not find that it is absolutely settled in any of the Courts in this Kingdom, how the Service of Process in *England* is to be ascertained; which is really a Matter of some Consequence. The several Courts of Law at *Westminster* do (as I am told) receive

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ceive and admit to be read, all Affidavits from this Kingdom, if sworn before a Judge of the same Court, as does the Court of *Chancery* there, all Affidavits which are sworn before a Master in *Chancery* here, without any Doubt or Difficulty whatsoever. Whereas, here, it is not sufficient that the Judge or Master's Name appears to be to the Affidavit; but it is often required either that some Person who is acquainted with the Hand-writing of the Judge, or Master in *England* shall prove it here, or else that he saw the Judge or Master sign the Affidavit. Now, it seems very extraordinary to me, that we should not pay them the same Compliment in this Respect that they pay us. The only Objection I have ever heard to receiving such Affidavits here, without the Proof I have before-mentioned, is, the Danger of Forgery, and the Difficulty there may be of proving it.

If the Rules and Practice of the three Law Courts were to be carefully examined into, and properly settled by all the Judges on a Meeting for that Purpose, and made to correspond and agree in all Matters, where it could conveniently be done, and afterwards not to be varied from, unless upon a like Consideration of the Judges, I am inclined to think it would be of infinite Service to the Public. And, I believe, if the like Method was to be pursued, with the Rules and Practice of the two Courts of Equity, it would not be amiss.

The Proceedings upon Outlawries in personal Actions, is another Proceeding in the Law, whose Abuse is a Grievance, most worthy the Consideration of the Legislature. After the Defendant has been proclaimed upon the Writs of *Exigent* and
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Proclamation, a *Capias utlagatum* issues against him for his Contempt, in not appearing upon these Proclamations, when perhaps, (and indeed it is seldom otherwise) these Proclamations have been transacted by a rewarded Sub-sheriff, in so private and secret a Manner, that it was impossible the Defendants should have ever heard of any of them.

Then, upon this *Capias utlagatum*, an Enquiry is to be called, as secretly and clandestinely as the Proclamations were made; proper Jurors returned, a Bum-bailiff, or some other Creature of the Sub-Sheriff, sworn to the Estate and Possession, and that upon his Belief only, and thereupon an Enquiry found, and returned into the *Common-Pleas*, and from thence estreated into the *Exchequer*; so that the whole Proceeding is clandestine, and generally a series of Untruths, secret Outlawries, and private Enquiries without the least Notice to the Debtors, Purchasers, or Mortgagees in Possession.---Whereas, in Ejectments, and upon *Scire facias*'s and in all other Cases, a Man has by Law a Right to have Notice to make his Defence, before he is stripped of his Estate or Possession; but because of the Benefit of the King's Prerogative in this Process, it is too frequently chosen and prosecuted perhaps for very small Sums, and often less, than the very Cost of it amounts to.

And then upon this Proceeding, the Creditor takes all, and by *Elegit*, but a Moiety; by this, he gets an actual Possession, by *Elegit* but a legal Possession, the *Custodiam* being found on a meer Fiction of the Law, viz. that the King is concerned. Now, suppose the Legislature, should make Executions on Judgments reach the whole Estate, as they do on

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Custodiams, and Statute Staples ; and that the fair Creditor should get an actual Possession thereon, without the Trouble, Loss of Time, and Expence of an Ejectment to get a second Possession of the same Thing ; or provide, (as in other Cases) that the Tenants should have Notice ; would it not be better for the Debtor, Creditor, Mortgagee, and Purchaser, which may include the whole Nation, except the Attornies and Officers of the Courts, of common Law who issue them, and the Sheriffs and Sub-sheriffs who execute them.

Did our good and gracious King but know even Half the Distresses, Hardships, and Grievances, that his Subjects in this Kingdom endure from these Outlawries, being in his Name and under the Fiction of his Prerogative, although neither his Majesty nor his Prerogative are any more really concerned therein, than one of the Nabobs of the *Indies*, it would grieve his honest Heart ; that a Landlord whose Tenant contracts a Debt, for which a *Custodiam* has issued, cannot bring an Ejectment for Non-payment of Rent, without the Leave of the Court of *Exchequer*, upon an Application for that Purpose, having first attended the Attorney General with a Fee for his Leave also. Then, Mortgagees are often stript of their Securities, and put to great Expence, and laid under many Difficulties to recover their Rights, as are also Jointure and Dower Widows, and other Annuitants ; and the poor Tenants harassed among them to absolute Beggary and Ruin ; and all this, under the same Pretence or Fiction of the King's Prerogative, too frequently laid hold of by Creditors, whose Debts or Demands are of an inferior Nature, or disputable, or perhaps not a single Six-pence due ; so that Judgments, the common Se-

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curity of the Kingdom, are thereby rendered most precarious and uncertain, and often quite ineffectual.

Another Matter most worthy of Consideration, is, the Method of entering Judgments on Bonds, with Warrants of Attorney, in the several Courts of Record in *Dublin*. It is in the Power of any Attorney that is a bad Man, to charge any Man's Estate with any Sum he pleases, without any Authority or Power for so doing, or perhaps on a forged one (in which last Case it may happen, that the Attorney is entirely innocent) for when a Cognovit is brought to the Judge, he immediately signs it as does the Officer of the Court receive and file it, without either of them requiring or desiring to see any Warrant or Authority for the Purpose, or if they did, it might (as I before observed) be a forged one. The Warrant of Attorney to acknowledge Satisfaction on a Judgment, must be authenticated by the Oath of one of the Witnesses who attested it, and is to be filed in the Office before the Satisfaction shall be entered on the Record; and, surely there is to the full as much Reason, that sufficient Caution should be used in the entering of the Judgment, as in the taking of it off.

There is also another terrible Inconvenience, attending this our common Security, by Judgment which is in the Proceedings, on reviving them by *Scire facias* against the Heir and Ter-tenants, where the Cognizor happens to die. In some Cases, it is almost next to an Impossibility for the Creditor to recover his Money, and the larger the Estate, the greater the Difficulty and Expence will be; for if there be five Hundred Tenants, every Tenant, be
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his Holding ever so small, must be summoned by the Sheriff; if any one be omitted, it may be pleaded by any of the other Tenants that has been served, and shall abate the Writ. Then every one of these five Hundred Tenants, may plead separately, and if there be any of them who had Freehold Leases antecedent to the Judgment, they may plead *non Seizin* in the Cognizor, upon which the Creditor must go to Trial, and if the Fact be so, the Plea will be good; then there may be many other Delays, and Difficulties by the Deaths or Changes of any of the Tenants, who have been so summoned. So that it might be better for the Creditor, to sit down at first with the Loss of the Debt, than have the Trouble he is to go through on this Occasion, besides the Expence, not one Half of which he can ever hope to get.

By the Act of Parliament, made in the fifth Year of his present Majesty for the Relief of Creditors, in Suits with Executors or Administrators on prosecuting an Execution, *de bonis test.* to a *Devastavit*, tho' the Plaintiff obtains a Verdict, yet there is no Cost given him; and if the Executors, &c. controvert the Matter strongly, it may happen that the Costs on this Occasion, shall exceed the original Demand.

Upon all Judgments in all Actions on the Case, as the Law now stands, no Interest is allowed from the Time the Judgment is obtained therein, nor any Post-costs; and yet the Plaintiff seems to be as well entitled to Interest and Post-cost, upon this as upon any Judgment in an Action of Debt.

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The Ejectment was given by several Statutes, to remedy the Inconveniencies which happen'd to Landlords, by Reason of the many Niceties which attend Re-entries at the common Law. But in these Statutes, there is a Saving for Infants, which, if it Extends as well to Infants out of Possession, as to Infants in Possession; (and it is apprehended it does) may, in many Cases render ineffectual, and entirely frustrate the whole Intent and Meaning of these Acts; and especially where Family Settlements are made of Leases for Lives, with several Remainders in them, be they either for valuable Consideration, or voluntary Deeds.

Then, as *Irish* Landlords, are now grown somewhat less Tyrants to their Slaves and Beggars, than they have been formerly, there is one Inconvenience which often happens in the Laws between Landlord and Tenant, which I could wish, the Legislature would think worthy of being remedied; and that is, that a Tenant when a Lease or Contract is expired, or if the Tenant be but at Will only, and has no Pretence whatever to continue his Possession, but does it out of Obstinacy or Knavery, yet he cannot be turned out but by an Ejectment, though it be of a poor Cottage, the Rent whereof may not perhaps, in eighteen Years repay the Charges of the Ejectment; all which most generally fall upon the Landlord; for if the Tenant suffers Judgment by Default, there is no Cost against the Tenant, for this Judgment is against the casual Ejector, who is a Man of Straw; and if the Tenant does take Defence, and Cost is given against him, in all likelihood he is, in Effect another Man of Straw.

As

As the Law now stands on every *Fieri facias*, and other Executions against the Goods of a Debtor, when a Part of the Money is levied, and a Return by the Sheriff, that the same remains in his Hands for want of Buyers, and that a *Vendit. Expon.* issues for Sale of the said Goods, and an Execution for the Remainder, no Interest can be charged on the remaining Sum, unlevied upon the first Execution.

The Proceeding in this Court by Subpœna, is not only in many Cases extremely advantageous to the Plaintiff, but is also greatly so, with Respect to the Defendant. It is a humane and gentle Method of calling on the Defendant to discharge the Debt he owes, without exposing or affronting him, and gives him sufficient Time and Opportunity, of considering whether he ought to pay it, or has a proper Foundation for contesting it, and yet, if the Defendant should be obstinate, and not appear upon this civil Summons, the Plaintiff has no Remedy but by entering Process of Contempt against him, at a great Expence to a Serjeant at Arms; on which, perhaps the Defendant shall never be taken, or if he be, it may never be of the least Benefit to the Plaintiff. Now, I humbly conceive this Grievance may be removed, if an Act of Parliament was made, that in all such Cases, where the Defendant shall not appear, in four Days after the return of the Subpœna, then upon Affidavit being made, and filed, of the Service of the Subpœna, in some of the usual Ways of serving Subpœnas, the Court to appoint an Attorney to enter a common Appearance for the Defendant, and that the Plaintiff may then proceed thereon, as if the Defendant had entered an Appearance by his own Attorney. See the

Statutes made in *England*, in the 12th Year of his late Majesty's Reign, ch. 29. and the 1st Year of his present Majesty's Reign, ch. 27. to prevent Arrests on any Writ out of any superior Court, for any Sum under 10*l*.

Lastly, the great Delays, and terrible Expences, attending the Prosecution of our Laws, are, undoubtedly, Grievances well worth wishing to be remedied, but in a Country where Freedom and Liberty exist, hard to be effected, but by breaking in on these invaluable Blessings, and making the Remedy worse than the Disease. As for the Fees to Lawyers, every Man, in a free Constitution, has such a Right to dispose of his own Property as he shall think fit, as might make it dangerous to that Freedom to deprive him of, so that with Safety, there can be no restraining either the Client from giving what he will, or the Lawyer from receiving it. And as to the Fees of Offices, whilst Employments continue to be bought and sold, and at such exorbitant Prices as are daily paid for them; every Purchaser will think, and not without Reason, that they have as undoubted a Right to those Emoluments, which, upon the Sale, were handed over to them, and for which they have so largely paid, as can be to any other Thing whatsoever, which is purchased on a public Cant. The civil Bill Act which has lately passed in the City of *Dublin*, will very much ease the Subject in the Expence of Law Suits for small Sums: But suppose it had extended to forty Pounds, as it is a Court of both Law and Equity, and suppose also, that no Suit should be afterwards admitted to be prosecuted, either in the Court of *Chancery*, or the Equity Side of this Court, where the Value of the Demand should appear to
be

be under that Sum. It is also to be wished, that Civil Bills in the City of *Dublin*, might have been for Sums under 40*s.* as it is in other Parts of the Kingdom; it is true, it would have lessened the Revenue the Lord Mayor of the City has by his Court, but it would have prevented many of the Grievances and Mischiefs which arise to the Public, from the Manner in which the Proceedings of this Court are carried on; and above all, the many Perjuries that are committed, by determining the Matters in Controversy, by the Oaths of the Parties, and which must every Day more and more encrease, for altho' the Jurisdiction of this Court does not extend to above forty Shillings Matters, yet the Sum is as much to those, who in the general are the Parties in this Court, as five Hundred Times the Sum may be to Persons of Fortune, and of Course, the Temptation to Perjury in Proportion; and there is nothing more common, than to see the Parties struggling, who shall swear first as he generally gains the Cause. It would be well for the Public if this Court was entirely abolished, and as for any Loss the Lord Mayor may sustain from thence, he could easily be recompenced. In Truth, the whole Income he has is not near sufficient (considering the Change of Times, and the Prices of Provisions) to support the Dignity of his Station, and the Parade he cannot avoid: It is the same it was, when a Shilling would go as far in the purchasing of many of the Necessaries of Life, as three will now.

Before I take my Leave, there is one Thing I beg leave to recommend to my Readers, the Practitioners of the Court, which is that, wherever I have in these Treatises, ventured to set down any Matter of either Law or Equity, out of the common
Road

Road of Practice, that in such Cases, they will use it only as Instructions, or as a Direction, or Assistance for them, in their Application to Council, for there are few Cases, which are attended with the very same Circumstances, or that do not vary in some Instance, and a Mistake in this Way, may be attended with very unlucky Consequence to their Clients; besides, it would be acting out of their own proper Sphere, or Province, which never can be justifiable in any Business, or in any Profession.

Having thus gone through with a Representation of such of the Grievances in the Practice and Execution of our excellent Laws, which in my small Course of Experience have so appeared to me, I must venture to trespass so much further on the Patience of my Readers, as to mention some Things in Regard to the present Situation of our publick Offices, and the ruinous Condition in which some of them are. I cannot pass it over, as it is a Matter, than which there is not, nor can be, any of greater Consequence to the Kingdom, and which has a long Time called most loudly for Redress. Let any Man but imagine to himself what a terrible Condition the whole Kingdom would be in, if one of these, either the Rolls Office, Fine and Recovery Office, or one of the Judgment Offices, with all its publick Records, should fall down or be destroyed by Fire; and there is not a Day of our Lives but, from their present Situation, they are absolutely liable to either the one or the other of these Accidents; and it is next to a Miracle that they have so long escaped; why, a Century would not see an End to the horrid Distraction, Ruin, and Confusion,, into which the whole Nation would be inevitably plunged by such an Accident.

Then,

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Then, these public Offices are so dispersed and scattered through the whole City, and at such large Distances each from the other, that if a Man happens to have Business in several of them, (which is often the Case) it will take him the best Part of a whole Day to go through them : And as there is but one Office in the Kingdom confined to certain Hours of Attendance, and as the most diligent Officer cannot be always in the Way, a Man may lose several Days before he can compleat the Business he is about.

If it shall ever happen that Archives or Repositories for the public Records shall be erected, and built in one Place, and together ; I would have them built in such a Manner, as to be as safe from all Accidents of Fire, as human Prudence can devise. I would have them vaulted, every Floor, and as little Wood in them as possible ; the River so near them, as there may be at all Times, a sufficient Supply of Water in Case of Accidents. They should be as much detached from, and as clear of any other Building as possible, and not above one Story high above the first Floor. And I would also have Chambers and Offices built in the same Place, to be let to Lawyers and Attornies, and all the public Officers and Ministers of the several Courts. *

And

* *A Sum was granted by the Legislature for building of public Offices sometime ago. It is to be wished it were applied.*

And then, I submit it to the Consideration of the Public, whether the several Officers of the respective Courts should not be obliged to certain Hours of Attendance, as is the Register of Deeds, &c. For although there may not be the least Reason to complain of any of the Gentlemen now employed, yet we can have no Assurance as to their Successors, and the expediting of Business is so great an Advantage to the whole Community, that no Stone should be left unturned, to promote, encourage, and secure it. It is their indispensable Duty to attend their Offices at seasonable Hours, and to give Business the best Dispatch they can, for they are well paid for it. They are undoubtedly the Servants of the Public, the Public are not to be Slaves to them; and from the first Judge to the lowest Officer in the Courts, they are bound to do every Thing they can, for the Convenience of the Public, and not to wantonly gratify themselves, at the Expence of, or Loss to it.

There never will be wanting Men of Abilities and Integrity, who will be glad to get Employments upon the Terms of a reasonable Attendance: Besides, it would be a great Means of lessening that Insolence of Office, which *Shakespeare* has so pathetically expressed, in that inimitable Picture of the World, which he has made young *Hamlet* draw; and which has grown to such a Height, not only in the Law, but in Business of every Kind, as even to descend to the meanest Hireling of the common writing Clerks, and which to endure, would often try the Patience of a very *Job*. But yet, I would not have it thought, that I am for having Gentlemen absolutely made Slaves, or deprived of a moderate Recreation, for the Benefit of the Public; for I think
the

the contrary, and that it is but fair and reasonable they should have some Respite from their Labours, and mix some pleasure with their Cares, but not at the Expence of the Public; for this Purpose, I would recommend that two Persons do act as Deputies in every public Office which required a constant Attendance; and where the Principal could not by his Attendance assist, or relieve his Deputy; or some such Method as this; for all that I contend for, is, that if a Man takes upon him the Execution of a public Office, he is not to postpone, upon any Account, the public Service to his private Pleasures and Amusements. Suppose a Person should by Chance meet his Debtor, who before had absconded to avoid the Payment of his Debt, and should instantly apply to one of the public Offices for an Execution, and that the Officer, or his Deputy, was not to be had until the Debtor had made his Escape, would a Country-house, or the reasonableness of a little Recreation, be such Excuses, as could, in Conscience, be offered to the honest Man, who, perhaps, by these Means had forever lost the Debt? *

This

* *It has sometimes happened, that Officers of the Courts have also been Solicitors of Causes, this should never be suffered, and especially if they have the Custody of any of the Pleadings, or Records of the Courts: For if it should happen, that they were Men not strictly honest, the Mischiefs may be greater than can easily be conceived. I should think an honest delicate Man would always chuse to avoid any Situation in Life, that may induce the least Foundation for Suspicion.*

This leads me now to mention an Evil which I would fain have thrown a Veil over, but for the great Degree of Excess to which it is arrived in this Kingdom above all others, and even among the Professors of the Law ; a Profession which requires the clearest, coolest Head a Man can possibly have. Can we complain of being censured of Dishonesty, if we undertake the Management of a Man's Affairs, and render ourselves incapable of conducting them? And is not this the Case of every Man, who has filled himself with strong Wines, unless he has such an uncommon Capacity as not one in a Thousand is ever blessed with? — I have had Occasion to transact Business in *London*, several Times, and I can affirm, and it is extremely well known, that there is no such Thing practised there, as for Men of Business to sit whole Evenings over their Bottle, in the midst of Term; and I have myself heard several of them say, they could not conceive how many of the Profession of the Law in this Kingdom effected any Business; for that they seemed to them to do nothing but walk the Courts the whole Morning, and to devote whole Evenings to the Bottle.

2*

When the great *Cyrus* was but very young, he was brought by his Mother *Mandane* to the Court of his Grandfather *Astyages*, King of the *Medes*; *Astyages*, that he might take off from his Grandson a Desire of returning into his Country, prepared the most sumptuous Entertainments, and exhibited all the Pomp and Grandeur that the voluptuous,
splen-

splendid, Court of *Media* could produce. Among the King's Officers he had a Cup-bearer, whose Name was *Sacas*. This Officer had the Misfortune, on some Occasion, to displease the young Prince, who thereupon requested of the King, that he might have Liberty to exercise this Office. Upon this the little *Cyrus* was straight equipped in the Habit of a Cup-bearer. He advances gravely with a serious Air, and a Napkin thrown over his Shoulder, and holding the Cup nicely on three of his Fingers, he presented it to the King with a Dexterity and Grace, which charmed *Astyages* and *Mandane*. When this was done, he threw his Arms around his Grandfather's Neck, and kissing him, cried out with great Joy, "O *Sacas*, poor *Sacas*, thou art undone, I shall have thy Place." *Astyages* was mightily pleased with him: "And well," says he, "my Boy, thou shalt have it; no Body can serve me better. But you have forgot one Part of the Ceremony, which is to taste of it before you give it." It was, it seems, the Custom for the Cup-bearer, to pour out a little of the Liquor into his left Hand, and taste it, before he presented the Cup to the King. "It was not through Forgetfulness," answered *Cyrus*, "that I did not so." "What then," says *Astyages*. "It was because I apprehended the Liquor to be Poison. Poison! How so? Yes indeed, Papa, for it is not long since I took Notice, at an Entertainment you gave the Lords of your Court, that after they had drank a little of that Liquor, all their Heads were turn'd. They baul'd and sung, and talk'd like Madmen. You yourself seem'd to have forgot that you was King, and they that they were your Subjects. At last when you got up to dance, you could not stand without staggering. How!" replies *Astyages*,
"does

“ does not the same Thing happen to your Father?
 “ Never,” answered *Cyrus*. “ How then? Why
 “ when he has drunk, he is no longer adry, and
 “ that’s all.”

*Ob! that Men should put an Enemy in their Mouths,
 to steal away their Brains. That we should with
 Joy and Pleasance, Revel and Applause, trans-
 form ourselves into Beasts.*

SHAKESPEAR’S *Othello*.

But in this Kingdom, it is a Custom so prevailing,
 that very few have Resolution sufficient to with-
 stand it.

*But, to my Mind, though I am Native here,
 And to the Manner born, it is a Custom
 More honour’d in the Breach than the Observance.*

SHAKESPEAR’S *Hamlet*.

When I first declared my Intention of publishing
 this Work, a Work so much wanted, and so long
 called for, I flattered myself that Subscribers would
 have crouded in, but to my great Surprize, the
 Printer could not collect as many Subscriptions as
 would pay for the Paper. Several indeed, said they
 would with Pleasure, subscribe to the Rules and
 Practice of the Equity Side of the Court, but that
 the Law was almost out of Doors. I am unwilling
 to attribute it to what many do, the little Inclination
 most of the Profession of Attornies have to read
 any Thing, however I shall soon try them with the
 Equity Side, in the finishing of which, I have spent
 much Time, as I have traced the Reason of the
 Practice there, in many Instances from the feudal
 Laws; as also, from the civil and the canon Laws of
 the

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the *Romans*. And in the Work relating to the Revenue, which is near finished; I have, besides the Rules and Practice, traced the whole History of the *Exchequer* and Revenue of *Ireland* from its Original, to this Day, with the Changes and Alterations that have from Time to Time been made in their Establishment, and the Method of Collection; all which three several Works, are comprized in six folio Volumes, in Manuscript, close wrote, the bare copying of which, as they have been copied several Times, I can with Safety say, stand me in above two Hundred Pounds, besides my Loss of Time these fifteen Years, for which I may put down some Thousands; having spent innumerable whole Days in public Offices, examining old musty Books and Records, from Morning till Night. If it be Envy that has prevented such a Subscription as I hoped for, I would have it understood, that I claim no Merit from it, but such as any other Person would have been entitled to for the same Pains; but can't help mentioning, that a certain Person in great Station, who took the Trouble to read some of my Productions, told me, that had I done such a Work in *London*, instead of losing, or not getting by it, I should have gained most largely.

H E A D S of a B I L L
FOR THE
AMENDMENT of the L A W
A S I T

Now stands in the Proceedings by Attornies, in recovering their Bills of Cost, humbly submitted to the Consideration of the Legislature.

WHEREAS in Actions brought by Attornies or Solicitors, for Bills of Cost, the Evidence necessary to support the same on any Trial at Law, frequently takes up more of the Time of the Court, and the Jury than can be well spared, and the Officers of the respective Courts, where the Businesses mentioned in such Bills of Costs are transacted, are better qualified to determine concerning the Matters contained in such Bills of Cost than a Jury, for Remedy whereof, we pray it may be enacted, that where any Action shall be brought by any Attorney or Solicitor, his Executors or Administrators, in the Court of *King's-Bench*, the Court of *Common-Pleas*, or the Court of *Exchequer*, in this Kingdom, for or on Account of any Bill or Bills of Cost, served in such Manner, as in and by a certain Act of Parliament made in this Kingdom, in the 14th Year of his present Majesty's Reign, intituled among other Things, An Act for

for the better regulating the Payment of Fees of Attornies and Solicitors is required, and that the Defendant or Defendants in such Action, appear thereto, by his, her, or their Attorney, or Attornies, that it shall and may be lawful to and for such Attorney or Solicitor, his Executors, or Administrators, to have the Bill, or Bills of Cost, for which such Action shall be brought, taxed and settled by the proper Officer, or Officers of the respective Courts, where the Business contained in such Bill or Bills of Costs hath been transacted, in Manner herein-after mentioned, *to wit*, that the Plaintiff or Plaintiffs shall serve the Attorney or Attornies, so appearing for the Defendant or Defendants in such Action, with a Copy of such Bill of Costs, as hath been, or shall be served on the Defendant, pursuant to the said recited Act, and that within four Days after such Service, it shall and may be lawful, to and for the Plaintiff or Plaintiffs in such Action, to procure one or more Summons, or Summonses, directed to such Attorney so appearing for the Defendant or Defendants in such Action, from the proper Officer or Officers of the Court or Courts, where the Business mentioned in such Bill or Bills of Costs, so served as aforesaid, hath been, or shall be transacted, to attend the Taxation of such Bill or Bills of Costs; and that such Officer and Officers, shall upon Affidavit made, that such Summons or Summonses, was or were served, on such Attorney or Attornies, so appearing for such Defendant or Defendants, in such Manner, as is now used in the Taxation of Bills of Costs in other Cases, proceed to tax and settle such Bill or Bills of Cost in his Presence; or if he shall refuse or neglect to attend such Taxation, that then such Officer or Officers, may proceed to tax the

the said Bill *ex parte*; and that all and every Bill and Bills of Costs, which shall be taxed, pursuant to this, or the said recited Act, shall upon any Trial, to be had in any Action, to be commenced or prosecuted by such Attorney or Solicitor, his Executors or Administrators, or upon any Writ of Enquiry of Damages to be sped, be held deemed and taken, as full and sufficient Evidence of the several Matters and Charges, contained in such Bill and Bills of Costs, respectively taxed as aforesaid.

Provided always, that nothing herein contained shall prevent or hinder the Person, or Persons, chargeable with such Bill or Bills of Costs as aforesaid, from giving in Evidence on such Trial, or on the Speeding of such Writ of Enquiry, the Payment of any Sum, or Sums of Money, or any other Satisfaction, made for, or towards the Discharge of such Bill or Bills of Costs.

And whereas, Attorneys and Solicitors, by being obliged to serve Bills of Costs, in Manner prescribed by the said recited Act, before they are at Liberty to proceed at Law for the Recovery thereof, have lost, and are likely to lose several Sums of Money by Persons withdrawing themselves and their Effects out of this Kingdom, for Remedy whereof, we pray it may be enacted, that where any Sum or Sums of Money is, or are, or shall be due, by any Bill or Bills of Costs, to any Attorney or Solicitor, his Executors or Administrators, and that it shall appear by Affidavit, to any of the Judges of the said Courts of *King's Bench*, or *Common-Pleas*, or to any of the Barons of the *Exchequer*, that such Sum or Sums of Money is or are due, and that the Person or Persons char-

chargeable with such Bill or Bills of Costs, intend to withdraw him, her, or themselves out of this Kingdom, and that such Attorney or Solicitor, his Executors or Administrators, will thereby be in Danger of losing such Sum, or Sums of Money, that it shall and may be lawful to and for such Attorney, or Solicitor, his Executors or Administrators, by Leave of any of the said Judges or Barons first had or obtained, to issue such Process for the apprehending and taking such Person and Persons chargeable with such Bill or Bills of Costs, as he, she, or they, might have done, at any Time before the passing the said recited Act, and that in such Case, such Attorney or Solicitor, his Executors and Administrators, shall and may proceed for the Recovery of such Bill and Bills of Costs, in such Manner as he or they might have done, at any Time before the passing the said recited Act. Provided always, that such Attorney or Solicitor, his Executors or Administrators, do and shall within two Days after the issuing of such Process, for the apprehending and taking such Person or Persons, chargeable with such Bill or Bills of Costs, lodge and depose such Bill and Bills of Costs, and a true Copy thereof, with the proper Officer for taxing Bills of Costs in the Court from whence such Process shall issue, and that such Officer shall with all convenient Speed, at the Request of the Person or Persons chargeable therewith, deliver to him, her, or them, or any Person authorized by him, her, or them, without any Fee, Gratuity, or Reward, such Copy as aforesaid. And that such Officer, upon his receiving such Bill and Bills of Costs, and Copy, shall be intitled to receive as a Fee from the Person or Persons lodging the same, the Sum of three Shillings and four

four-pence, as and for his Fee upon that Occasion. And that it shall and may be lawful to and for the Defendant or Defendants, against whom such Process shall issue, as aforesaid, to procure such Bill and Bills of Cost, (which shall be lodged with the Officer in Manner aforesaid) to be taxed in Manner herein before directed, and that such Taxation shall be conclusive, and such Defendant or Defendants, shall be discharged, upon Payment of the Sum so taxed.

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A COM-

A COMPENDIOUS
T R E A T I S E
OF THE
RULES and PRACTICE
OF THE
P L E A S S I D E
OF THE
EXCHEQUER in *IRELAND*, &c.

Of ACTIONS.

ALTHOUGH the *Exchequer* in *Ireland* was originally instituted for conveying the King's Treasure, and Revenues into his Coffers, and no person by * Act of Parliament allowed to sue therein, who was not a Minister, or Servant to a Minister of the Court; nevertheless in process of Time this was overlooked, and this Court has greatly enlarged it's Jurisdiction and Power, most Actions being now allowed to be brought therein; as *Debt*, *Deti-*

Exchequer, it's first Institution.

The several Actions allowed in this Court.

VOL. I. B

* By Stat. 38. *Hen. 6.* ch. i. On Forfeiture of 10*l.* one half to the King, and the other half to the Person who will sue for the same.

Detinue, Trover and Conversion, Trespass, Covenant, Case, Ejectment, Waste, Prohibition, Actions on penal Statutes, &c. and has extended it to others besides the Ministers of the Court, so that now whosoever will, may commence Suits in Law and Equity in this Court; but in order to give Jurisdiction to the Court, the Plaintiff shall surmise that he is Debtor to the King, and that for the Wrong which the Defendant doth him, he is less able to pay his Debt to the King, as in the Writ of *Capias Quominus*, &c.

To what Actions
it does not ex-
tend.

But Actions in *Replevin, Dower, Quare Impedit*, &c. And all real Actions, are out of the Jurisdiction and Power of this Court; nor are there any original Writs in it; neither is any Process of Outlawry sued forth here upon any Actions, nor hath the King any Fine in this Court upon any Action whatsoever. See *Title Declarations*.

No Wager of
Law upon *Quominus* in the *Exchequer*.

And, Note, That in any *Quominus* brought by the King's Debtor in the *Exchequer*, against one who is indebted to him upon a simple Contract, the Defendant shall not have his Law, and yet the King is not party; a *Fortiori*, when such Debt or Duty is forfeited to the King, and the King is sole and immediate Party. 4 *Co. Rep.* 95.

In

In the Case of *Carey* against the Judge of the Consistory Court of *Cloyne* and *Förster*, in this Court, 19th and 20th of *June*, 1750, it was determined on a full and solemn Debate, that a *Prohibition* may issue out of this Court, and accordingly a Prohibition was granted unless Cause the first Day after of the then next *Michaelmas* Term, with a *Cessat Processus* in the *Interim*; but this Jurisdiction is taken up by the Court, under the Notion or Surmise that the Party is Debtor to the King.

Prohibition in
the *Exchequer*.

Now, as the Success of almost every Suit in a great Measure depends on the bringing of the Action properly, it was intended, to have treated more fully on this Head, to have taken Notice of the several kinds of Actions, in what Cases an Action will lie, and for whom, and against whom, with some Rules as to the laying and bringing of Actions in all Cases; but the Author found it a Task too arduous by far for him to undertake: besides it is the Business of another Class of the Profession, whereas he meant this Treatise only for the Use of the Practitioners, and it would swell this Work to a Size too large for the Purpose for which it was intended. But as there are some Persons who are absolutely excluded from bringing Actions, and others who cannot bring them in their own Names, he thought it would not be amiss to mention them shortly, and es-

Of *Actions*.

pecially as Cases of Necessity may happen in the bringing of Actions, where it may not be prudent, or safe to delay, or wait for the Advice, or Opinion of a Council.

What Persons are excluded from bringing Actions.

The Persons who are excluded from bringing Actions are Persons attainted of Treason, or Felony, outlawed, or excommunicated Persons; Persons convicted of *Premunire*, Aliens born out of the King's Allegiance, and Persons entered and professed in Religion, these cannot maintain an Action while such Impediments remain.

Who may bring Actions.

But all Persons who are not disabled as aforesaid, Ideots, Lunaticks, deaf, or dumb, &c. may bring Actions and maintain them, but Infants and Feme Coverts cannot bring them in their own Names.

Infant to sue by his Prochein Amy.

Where an Infant hath a Cause of Action, he is to sue in the Name of his Prochein Amy. See the *Stat. 13 Ed. 1. ch. 15.*

And an Order to be obtained for that Purpose.

But it is sometimes practised, and said to be the regular Method, to obtain a Rule for admitting the Infant to sue by his Prochein Amy, which the Court will grant on an Attorney's Motion, and if the Infant has a Guardian, it is usual to appoint him the Prochein Amy to the Infant. It was so done in the Case of Lord

Howth

Of Actions.

5

Howth against *Wade* in this Court, the 16th November, 1749, and the Court said the Motion was a proper one.

But in 1 *Inst.* 135. It is said that an Infant may sue by a Prochein Amy or Guardian, but must always defend by Guardian.

Or he may sue by his Guardian and must always defend by him.

Idiots cannot appear by Attorney, but when they sue or defend any Action, they must appear in Person, and the Suit is to be in their Names, and followed by others. 2 *Sid.* 112. 335.

Idiots how to appear, sue and defend.

If a Lunatick sues an Action, it must be sued in his own Name; and if an Action be brought against a Lunatick, he is to appear by Attorney if of full Age, and by a Guardian if under Age. 1 *Inst.* 135.

And Lunaticks.

When an Action is brought by Executors, it is to be in the Name of all of them, tho' some do not take upon them the Executorship, but such only as administer are to be sued. 1 *Rol.* 924.

Actions by and against Executors.

In all Cases where the Feme shall not have the Thing recovered, but the Husband only, he alone is to bring the Action. 1 *Rol. Rep.* 360.

Baron and Feme when the Action is to be in the Name of him only, and when of both.

But in those Cases where the Debt or Cause of Action will survive to the Wife, the Husband and Wife are regularly to

Ibidem.

join in the Action; as in recovering Debts due to the Wife before Marriage, in Actions relating to her Freehold and Jointure, or Injuries done to the Person of the Wife. 1 *Rol. Abr.* 347. *Moore*, 432.

When a Feme Covert can sue without her husband.

A Feme Covert can in no Case sue without her Husband unless he has abused the Realm, or is banished, whereby he is *civiliter mortuus*, *Co. Lit.* 133 a. 1 *Rol. Rep.* 400. And *Quere*, if in these Cases she is not to sue by her Prochein Amy?

How the Damage is to be laid when they sue jointly.

When Husband and Wife join in any Action, Damage is to be laid only to the Husband.

In what Cases Actions must be against them jointly.

The Husband is by Law answerable for all Actions for which his Wife stood attached at the Time of the Coverture; and also for all her Torts and Trespasses during Coverture, in which Cases the Action must be joint against them both; for, if she alone were sued, it might be a means of making the Husband's Property liable, without giving him any Opportunity of defending himself. See *Bacon's Abridg.* Vol. 1. 307.

An ABRIDGMENT of several Statutes relative to ACTIONS.

There are also several Statutes now in Force relative to Actions, and Suits, but as they are pretty numerous, the Author therefore, and for the Reasons beforementioned, thinks it necessary to set down only those that may be immediately necessary for an Attorney to know, and chiefly such as relate to the Limitation of Actions.

By Stat. 4 *Ed.* 3. ch. 7. *Eng.* Executors shall have an Action for a Trespass done to the Testator, as for his Goods and Chattels carried away in his Life, and shall recover their Damages in like Manner as he, whose Executors they are, should have done if he had lived.

Executors to have an Action for Trespass done to their Testator and recover as he should have done.

By Stat. 4 *Hen.* 7 ch. 20 *Eng.* Recovery by Covin in Actions popular, shall be no Bar in an Action *bona fide*, and the Defendant, attainted of Collusion herein, shall suffer two Years Imprisonment, but to be prosecuted within one Year; and the Release of a common Person shall not discharge it.

Recovery by Covin, in Actions popular no Bar in an Action *bona fide*.

And by 28 *Hen.* 8 ch. 21. All Actions upon penal Statutes, where the Forfeiture goes to the King, are to be prosecuted

Forfeitures to the King or Informer, or King and Informer when to be prosecuted.

ed

ed within two Years, and where to the Informer, or to the King and Informer, within one Year. But Care must be taken that a shorter Time is not limited by any other Statute, for if there be it must be observed. *Vide post.*

No Action shall abate by Demise of the King or Promotion of Dignities.

By Stat. 10. ch. 1. Sefs. 1. ch. 14. No Writ, Action, or Suit shall abate on Account of the Death of the King, or of any Persons being promoted to Dignities pending the Suit.

Executors of Tenant in Fee simple, &c. may bring Action of Debt for Rent unpaid at the Death of the Testator, while the Lands continue in the Demesne of the Tenant.

By 10. *Ch.* 1. Sefs. 2. ch. 5. Executors and Administrators of Tenants in Fee simple, Tail, or for Life, may bring Action of Debt for Rent unpaid at the Death of the Testator, &c. or may Distrain for the same as long as the Lands continue in the Demesne of the same Tenant, &c.

The Husband after the Death of the Wife may have the like Remedy.

And the Husband after the Death of his Wife, may have the like Remedy for Rent of her Lands unpaid before her Death.

The like Remedy for Tenant, *per autem vic* where *Coff. qu.* *vic* dies.

The like Remedy for Tenants for the Life or Lives of other Persons, where the Person or Persons for whose Life, or Lives the Estate, &c. did depend, do dye.

None to make Entry but within 20 Years from his Title.

By 10 *Ch.* 1. Sess. 2. ch. 6. None are to make Entry into any Lands, &c. but within 20 Years from his Title. A

Sav-

Of Actions.

9

Saving of 10 Years after Impediments removed for Infants, Feme Coverts, Persons *non compos Mentis*, imprisoned or beyond Seas.

A Saving for Infants, &c.

And by the said Statute, all Actions on the Case, (except Slander) Account, (except concerning Merchandize) Trespass, Debt, Detinue, Replevin, *Quare clausum fregit*, are to be brought within six Years.

Actions on the Case, Account, Trespass, Debt, Detinue, &c. to be in 6 Years.

All Actions of Trespass of Assault, Battery, Wounding, or Imprisonment in four Years.

Assault, &c. and Imprisonments in 4 Years.

And all Actions on the Case for Words, within two Years.

For Words in 2 Years.

But on Reversal of Judgment in any of these Actions by Error, or Outlawry, the Plaintiff to have one Year after the Reversal to bring his Action anew.

Plaintiff to have 1 Year after Reversal or Outlawry.

A Saving for Infants, Feme Coverts, *non compos Mentis*, imprisoned, or beyond the Seas, so as they commence their Suits within the Times before limited after their respective Impediments are removed.

Saving for Infants, &c.

This Act not to extend to *Quare Im-* pedit, Darrein Presentment, or *jure Patronatus*, nor to the Possessions, &c. of the Clergy or spiritual Livings, nor to Tythes, Pensions, Portions, Obventions, Obla-

To what this Act is not to extend.

* *Vide* 6 *Ann.*
ch. 10 Post.

Oblations, or to any annual, casual, or hereditary Profits *.

Actions popular, and on penal Statutes to be prosecuted in the County where the Offence was committed.

By 10 and 11 *Cba.* 1. Sess. 4. ch. 11. Actions popular, and all Actions upon penal Statutes, shall be prosecuted in the County where the Offences were committed, and the same Process shall issue therein as in Actions of Trespass, *Vi & Armis*. And Informations laid in *Dublin* shall be void, (*Quere*, If the Offence was committed in *Dublin*?)

And no Declaration to be received by the Officer but on Affidavit thereof.

And the Officer of the Court is not to receive any Declaration, &c. in such Action, until the Informer shall produce an Affidavit, that the Offence was not committed in any other County than as laid in the Declaration.

To what this Act shall not extend.

This Act extends not to Maintenance, Champerty, King's Custom, nor to any Action, &c. against any Sheriff upon the Statute 23 *Hen.* 6. ch. 10. for not making a Deputy as directed thereby.

No Action on collateral Promises, or verbal Promises, nor on any Agreement not to be performed within one Year unless reduced to Writing.

By 7 *Will.* 3. Sess. 1. ch. 12. No Action lies against an Executor or Administrator on a special Promise for the Debt, &c. of the Testator, &c. out of his own Estate; nor to charge any Defendant on special Promise for the Debt, &c. of another. Nor on any Marriage Agreement. Nor on any Contract for Sale of Lands. Nor on any Agreement not to be performed within one Year, unless

Of *Actions*.

II

unless the same be reduced into Writing, and signed.

By 6 *Ann.* ch. 10. Actions of Account may be maintained against the Executors, &c. of a Guardian, Bailiff, or Receiver.

Actions of Account maintainable against Executors of Guardians, Bailiffs, &c.

And by one joint Tenant and Tenant in common, his Executors, &c. against the other, and his Executors, &c.

And by joint Tenants against joint Tenants.

And by this Statute, if the Defendant in case of any of the personal Actions in the aforesaid Statute 10 *Cha.* 1. Sess. 2. ch. 6. be beyond Sea, the Plaintiff has the same Time after his Return to bring his Action.

In personal Actions, if Defendant be beyond Seas, Plaintiff may have his Action in 6 Years after his Return.

At common Law no Action of Debt lay for Debt on a Lease for Life; for the Tenure being in the Realty, the Tenant could not be charged in any personal Action for it. 4 *Co.* 49. a.

Action of Debt may be on Lease for Life.

But by 9 *Ann.* ch. 8. (*Pars*) an Action of Debt may be brought for Rent on a Lease for Life against Lessee or Assignee as on a Lease for Years.

By 2 *Geo.* 1. ch. 5. None are to be subject to Action or Damages for accidental Fire broke out in his House, &c. (not to extend to Agreements between Landlord and Tenant.)

No Action or Damages for accidental Fires in Houses, &c.

By 8 *Geo.* 1. ch. 4. In Actions of Debt due on Specialties, Judgments, Satures,

&c. In Actions of Debt, &c. due 20 Years, if no Action be in that

Time, nor Interest paid, Defendant may plead Payment in Bar.

Ec. due 20 Years; if no Action or Suit be commenced in that Time for the Recovery thereof, nor any Interest paid, nor other Satisfaction made on account thereof, the Defendant may plead Payment in Bar.

How Actions shall be prosecuted against Bankers on concealing themselves.

By 8 *Geo.* 1. ch. 14. *pars.* A Banker concealing himself; on Affidavit of such, and on Demand at his Shop, the Party in such Case may prosecute his Action, as if the Banker had been arrested and entered an Appearance.

Chief-Rent due to Bishops at the Time of Translation, *Ec.* recoverable, *Ec.* by Action of Debt.

By 11 *Geo.* 2. ch. 15 Archbishops and Bishops may, after their Translation, bring Action of Debt for Chief-Rent; and their Representatives may do so after their Death against the Tenants who ought to have paid, or any claiming under them, so as such Action be commenced within two Years after Translation.

Actions against Justices of the Peace for Neglect in respect to Lotteries to be in six Months.

By 13 *Geo.* 2 ch. 8. Actions for the Penalty: by this Action Justices of the Peace neglecting their Duty appointed by this Act in respect to Lotteries, to be brought in six Months.

And Actions for the Penalties for Gaming and Horse Races, to be in three Calendar Months.

And Suits prosecuted on this Act, for the Penalties by this Act, on Horse Races or Gaming, to be commenced in three Calendar Months, and to be brought where the Cause of Action arose.

By

By 15 Geo. 2. ch. 4. Tenants who shall remove their Goods to defraud their Landlords, and Persons assisting therein, shall forfeit double the Value of the Goods, to be recovered by Action of Debt.

Action of Debt for Penalty on Persons removing Goods to defraud Landlords.

By 25 Geo. 2. ch. 1. Actions for the Penalty by this Act, for importing Gold and Silver Lace, not of the Manufacture of Great-Britain, to be brought in the Exchequer.

Actions for importing Gold and Silver Lace not of British Manufacture, to be in the Exchequer.

And by the said Act, ch. 4. Action of Debt may be brought for the Penalty of 50*l.* laid by this Act on Persons counterfeiting Licences for Hawkers and Pedlars; one Moiety of which goes to the King, the other to the Person who prosecutes or sues for the same.

Action of Debt for counterfeiting Licences to Hawkers and Pedlars.

And by the said Act, ch. 6. Assignees of Judgments may bring Actions thereon, and proceed in their own Names as the Assignors might have done.

Actions on Judgments maintainable by Assignees thereof.

And by the said Act, ch. 10. Action of Debt may be brought in any of the four Courts *Dublin*, or by Civil Bill (if within the Civil Bill Act) for the Penalties by this Act, and the Statute 3 Geo. 2. ch. 3. on buyers and sellers of Gold or Silver Plate unstamped.

Action of Debt for the penalties for Selling unstamped plate.

But Note, It is worthy of Observation here, that as there is no original Writ in

There being no Original in this Court, the safest

way to save an
Action from a
Limitation by
Statute, will be
to sue a Writ
out of some of
the other Courts
of Record.

in this Court, (the first Proceeding here being merely a compulsory Process to bring the Defendant into Court) therefore, no Cause can be said to be in Court until the Defendant appears; wherefore when any Action is limited by any Law, as to the Time of bringing it, and that the Plaintiff would save it from the Effect of such a Limitation without further Proceeding for a Time, the better Way will be to sue forth a Writ from some of the other Courts of Record, where the Writ is an Original, for in such Case only, the Plaintiff may be said to have brought his Action.

Of *PROCESS* and *ARRESTS*.

THE usual Process by which Defendants are in this Court compelled to appear are either,

- 1st. *A Writ of Capias Quominus.*
- 2d. An Attachment of Privilege *at the Suit of the Judges, Attornies, and Officers of the Court.*
- 3d. A Subpœna.

On the two first of these Writs, to wit, the Capias Quominus and Attachment of Privilege, the Defendant's Body is to be arrested and taken into Custody by the Sheriff of the County, to which they are directed. But as an Arrest may be
law-

lawful, or unlawful, either in respect of the Person on whom the Arrest is made, or in the Manner of the Arrest, as also in respect of Time and Place; it may be proper first to set forth how, and in what Cases an Arrest will be judged lawful or unlawful, as it is very requisite that this should be well considered before the Plaintiff issues his Writ.

And 1st. What Persons may or may not be arrested.

None shall be arrested for Debt, Trespas, &c. or other Cause of Action, but by Virtue of a Precept or Commandment out of some Court; but for Treason, Felony, or Breach of the Peace, any Man may arrest without Warrant, or Precept. *Terms de la Ley, 54.*

None to be Arrested but by Virtue of some Precept.

The Sheriff must take Notice (at his Peril) of the Person and Goods that he arrests, for if he arrests *J. S.* instead of *J. N.* he does it without Warrant. *Dalt. 112.*

Sheriff must take Notice at his Peril.

If the Warrant is to take *A. B.* and there are several of that Name, and the wrong Person is arrested, an Action of false Imprisonment lies. *Nels. Inst. 590.*

Other Persons of the Name.

Peers of the Realm and Privy-Counsellors are privileged, so are all Females who are Noble by Descent, or Marriage: but Note, a Difference between Females who are noble by Marriage and those

Peers, &c. Privileged.

Of *Process* and *Arrests*:

those who are noble by Descent; for it is true, *Si Baroneſſa, &c.* by Marriage marrieth under the Degree of Nobility, ſhe hath loſt her Name of Dignity; for in ſuch Caſes *Si mulier nobilis nupſerit ignobili Deſerit eſſe nobilis*. But if ſhe be noble by Birth or Deſcent, whoſoever ſhe marrieth yet ſhe remaineth noble; for Birthright is *Character Indelibilis*, but that which is gained by Marriage may alſo be loſt by Marriage, for *Eodem modo quo quicquid conſtituitur diſſolvitur*. See *Co. Litt.* Sect. 9. pa. 16. *E. F.* 6. *Co. Reg.* 53. Againſt theſe the Proceedings are by Letter Miſſive, Subpœna, and Diſtreſs Infinite.

Parliament Men
privileged.

A Member of Parliament is privileged as well in his Lands and Goods as in his Perſon during the Time of Privilege, for by being diſturbed in any of them he is hindered in ſerving the Common-Wealth, which is to be preferred before all private Interests whatſoever. *Styles Reg.* 502. *Vide Poſt.*

Bodies of Mem-
bers of Parlia-
ment for what
Time privileg-
ed from Arreſts.

And by Stat. 1 *Geo.* 2. ch. 8. Bodies of Members of Parliament are privileged from Arreſts 40 Days before and 40 Days after the Sessions or Prorogations and during the Sittings.

And Corporati-
ons and Compa-
nies.

Corporations and Companies are not to be arreſted, but are to be proceeded againſt by Summons and by Diſtreſs infinite. *Inſt. Legal.* 17.

By

Of Proceſs and Arreſts.

17

By 50 *Edw.* 3. ch. 5. and 1. *R.* 2. ch. 15. *Eng.* Clerks officiating Divine Service are not to be arreſted on Pain of Imprifonment, unleſs they conceal themſelves by Colluſion.

Attornies and Officers of the Court are privileged from Arreſts upon meſne Proceſs in all civil Actions; for it is preſumed they are always preſent in Court and ready to anſwer the Plaintiff there: but an Attorney, &c. may be arreſted at the Suit of an Attorney; * for, *Inter pares non eſt poteſtas*, 2 *Mod.* 208. 1 *Roll. Abr.* 274. So he may upon an Execution at the Suit of a common Perſon, it being a judicial Proceſs, or for Contempt, Miſde-meanour, or Breach of the Peace: ſo if he be ſued in *Auſer droit* as Executor, Adminiſtrator, Guardian, or Truſtee, he may be arreſted and held to ſpecial Bail, *Hob.* 177. *Sed Quar.* for the Privileges which Attornies have is not upon their own Accounts, but becauſe of the Prejudice that may accrue to the Buſineſs of the Court; and the Suitors therein, where their Attendance is required were they to be at all Times liable to Arreſts. And they are not held to ſpecial Bail, becauſe they are obliged to attend, and therefore are preſumed to be always amenable.

And Attornies and Officers of the Court.

* *Sed Quar.*

An Heir, Executor, or Adminiſtrator, is not to be arreſted for the Debt of the Anceſtor, Teſtator, or Inteſtate, for it

Heir, Executor, or Adminiſtrator, not to be Arreſted for a Debt due by the Anceſtor, Teſtator, or Inteſtate.

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C

would

Of *Procefs* and *Arrests*.

would be unreasonable to subject their Persons to an Arrest for the Debt of another; but an Executor or Administrator may be arrested for Rent which has become due since the Death of the Testator, or Intestate, and will be obliged to give Bail, if the Sum be 10*l.* or upwards.

A Person going to give Security of the Peace privileged.

A Person going to give Security of the Peace is for the Time privileged from Arrests. *Comberb. 29.*

So is a Witness and a Juror, and all Persons attending a Court of Justice.

So a Witness and a Juror are protected by the Law from being arrested upon any civil Action both in going to, and returning from the Court; as are all Persons who are summoned, or under a Necessity of attending Courts of Justice, though they have not any written Protection from the Court; but in order to prevent both Trouble and Expence, it will ever be the better Way to sue for a Protection.

If Protections extend to Contempts.

But it is said that Protections do not extend to Contempts. *Sed Quær.* for it would seem somewhat extraordinary in the Case of a Juror, or a Witness, whom the Court would punish for a Contempt for Non-attendance where they are summoned. See the Cases of Mr. *M^c Naghten*, Collector of *Colerain*, and of the Sheriff of *Limerick* in this Court, *Trinity Term, 1757.*

It

Of Process and Arrests.

19

It is said, that the Lord-Mayor of *London* is privileged from being arrested in any civil Action during his Mayoralty, but the Lord-Mayor of the City of *Dublin* may be so arrested. An Instance in the Case of *Wade* against *Burroughs* Lord-Mayor of *Dublin*, though it was then thought, that a Station of such Eminence and Dignity meritted a Distinction of Privilege from Arrests during its Continuance.

Lord Mayor of *Dublin* may be arrested.

The Plaintiff immediately after a Trial in *C. B.* was arrested at the Suit of the Defendant by Process of *B. R.* the Plaintiff was discharged and the Defendant fined. *Goldf. 33.*

Plaintiff Arrested by Defendant immediately after Trial by Process from another Court discharged and Defendant fined.

If a Defendant be legally delivered from an Arrest upon any Process, he shall not be arrested again at the same Time by any other Process at the Suit of the same Plaintiff, and the Plaintiff and Attorney shall be both punished as the Court shall think fit. *Reg. 15. Car. 2. B. R.*

Defendant legally discharged from an Arrest, Plaintiff shall not at the same time arrest him on another Process.

By 14 *Geo. 2. ch. 8. Sect. 3. Brit.* No Person who shall list himself to serve on Board any of his Majesty's Ships of War shall be arrested on any Process, except for criminal Matters, or for a real Debt amounting to 20*l.* to any one Person, to be verified by Affidavit; and if any such Person should be so arrested, the Judge of the Court from whence the

Seamen not to be arrested except for criminal Matters or Debt of 20*l.* to one Person.

Of *Process* and *Arrests*.

But Plaintiff may enter Appearance against them and proceed to Judgment &c. but not to Arrest the Body.

Process issued shall discharge him without Fees, and with Costs against the Plaintiff. But upon Notice given to such Seamen, or left at the last Place of his Residence, the Plaintiff may enter an Appearance for him, and proceed to Judgment, &c. against him, but not to have any Execution against the Body of such Seamen.

The like Law as to Soldiers but extends as to them but to Debts of 10 l.

And by 25 *Geo. 2.* ch. 2. Sec. 1. *Brit.* the like Law was made with regard to Soldiers who shall list, or be inlisted in his Majesty's Service; but that this Statute in regard to Soldiers extends but to the Sum of 10 l.

2dly. *The Manner of making Arrests.*

What is and what is not a sufficient Arrest.

It is not sufficient for a Bailiff (who has a Warrant against a Man) to say I arrest you at the Suit of *A. B.* Plaintiff in the Writ; but the Officer must actually lay hold of him, or touch him, otherwise it is no Arrest. *Trin. 3 Ann. B. R. Lill. Reg. 63.*

A Man in Custody and another Writ comes.

When a Man is in Custody of the Sheriff by Process of Law, and afterwards another Writ is delivered to the Sheriff to arrest him who is in Custody, he is presently in Custody by Force of the second Writ, although the Sheriff don't actually arrest him; for to what Purpose shall he arrest him, who is and was before in Custody. *Et Lex non præcepit*

Of Proceſs and Arreſts

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cepit inutilia, quia inutilis Labor ſtultus,
5 Rep. 89.

3dly. *As to the Time and Place.*

An Arreſt in the Night is lawful, as well at the Suit of the Party as at the Suit of the King. 9 Rep. 65. B. 66. A. Mackalley's Caſe. Cro. Ja. 486.

Arreſts in the Night lawful.

By 7 Will. 3. ch. 17. All Arreſts upon a Sunday are void, except for Treason, Felony, or Breach of the Peace, and the Perſons executing the ſame to answer Damages, as if they had done the ſame without Warrant.

Arreſts upon Sunday void.

If a Defendant be arreſted on a *Ca. Sa.* on the Day of the Return of the Writ the Arreſt is good, but if he be arreſted on any Day after the Return Day, it will not be good, tho' it is before the *Quarto die poſt*; nor can the Officer juſtify it in Treſpaſs, or falſe Impriſonment. 3 Salk. 46. cites 3. Cro. 180, 408. Moor 711. Sid. 229.

Arreſt good on the Return Day of the Writ, but not after.

By 3 Edw. 1. ch. 35. None (except the King's Miniſters) ſhall, within a Liberty arreſt, any Perſon paſſing through the ſame, and holding nothing thereof, for any Contracts, Covenants, or Treſpaſſes, made or done out of ſuch Liberty, in Pain to pay double Damages to the Party grieved, and a Fine to the King.

No Arreſt within a Liberty for Contracts out of it.

When Defendant lives in a Liberty, how the Sheriff is to proceed,

Mandavi Ballivo.
Non Omittas.

If the Defendant lives in a Liberty the Sheriff is to direct his Warrant to the Bailiff or other Officer who hath Execution and Return of Writs within the Liberty or Franchise, to execute the Writ, which if he do not, the Sheriff may return thereon a *Mandavi Ballivo*, &c. and thereupon a *Non omittas propter aliquam Libertatem*, shall issue directed to the Sheriff, upon which the Sheriff's Officer, may, with the Sheriff's Warrant, enter and execute the Writ within such Liberty; or if the Bailiff make an insufficient Return, a *Non omittas* will be granted.

The *Non Omittas* given by Statute.

The Writ of *Non Omittas* was given by the Statute of *Westminster*, 2. Ch. 39, for when the Bailiffs of Liberties had Return of Writs upon a Mandate to them they would do nothing. Now a Remedy is given by this Statute, for by the *Non omittas* the Sheriff is commanded *Quod non omittat propter aliquam Libertatem quin Exequetur preceptum Domini Regis.* 2 Inst. 450.

But the Coroners, if the Writ be directed to them, may enter a Liberty without a Mandate, and execute the Writ. So the Sheriff may on a *Capias Quominus*.

But if the Writ be directed to the Coroners there needeth no Mandate, for they may enter any Liberty, to execute it. And it is said, that the Sheriff upon a *Capias Quominus* may enter any Liberty, or Place of Immunity and execute it *Impune* under the aforesaid Surmise, that the Plaintiff is Debtor to the King, and for that very Reason, the Words *Quod non*

Of Process and Arrests.

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non omittas propter aliquam Libertate. quin eam ingred. &c. are inserted in the Body of this Writ. But if a Sheriff should enter a Liberty upon a common Capias from any other Court, and execute the Writ without first proceeding by a Mandate, &c. as is beforementioned, the Lord of the Liberty may bring an Action against him. See *Style's Reg.* 72.

There are also other Places of Immunity and Freedom from Arrests in all civil Actions, on Account of the Persons who preside there, or who reside therein, and the Respect and Deference that are due to them: Such are the King's Palace, or Castle of *Dublin*, and all Places within the Limits thereof, Courts of Justice, &c.

Other places of Immunity.

It is said, that if a Person be arrested on a *Mesne Process* in the Four Courts, *Sedente Curia*, he shall be discharged upon Motion, but not if he was taken in Execution: but even in that Case the Officer is punishable *per Curiam*, and that is the Practice at *Westminster*. See *Bulst.* 85. 3 *Salk* 46. And it is also said, that the Practice is the same on an Arrest at an Assizes.

If a Person be arrested on a *mesne Process* in the Four Courts *sedente Curia*, he shall be discharged, if on a Judicial, he shall not, but the Officer shall be punished.

Of Arrests in general, and some Statutes relative thereto.

The Sheriff is not to dispute the Authority of the Court altho' the Process shall

Sheriff not to dispute the Process of the Court.

Of *Process* and *Arrests*.

shall be erroneous, but is to arrest the Defendant. *Dalt.* 104, 106, 107.

The Bailiff's
Fee on an Ar-
rest, 4*d.*

By 23 *Hen.* 6. ch. 10. The Fee to the Bailiff on Arrest is 4*d.*

Sheriff to take
Bond for Appea-
rance only.

And by the said Statute no Bond shall be taken by the Sheriff or his Officers from a Person arrested but for his Appearance, and to be made to the Officer himself.

None to be ar-
rested on any
Process (Attach-
ments of Con-
tempt, or Privi-
lege, or for
Rescue excepted)
not expressing
the Cause of Ac-
tion, and Bail not
exceeding 40*l.* to
be taken by She-
riff, &c. for Ap-
pearance and to
be discharged on
an Attorney's
Appearance.

And by 7 *Will.* 3. ch. 25. None to be arrested on any Process (except *Capias Utlegatum*, Attachment for Rescue, Contempt, and Privilege) not expressing the Cause of Action, and where the Defendant is bailable by 23 *Hen.* 6. ch. 10. *English*, shall be compelled to give Bond for Appearance exceeding 40*l.* and all Sheriffs, &c. in such Cases shall bail such Defendants; and upon an Attorney's Appearance for the Defendant in the Court from whence the Process issued, such Bond shall be discharged.

Attorneys to
take Notice of all
Laws and Sta-
tutes relative to
Arrests.

And of all these Laws and Statutes relative to Arrests, the Attornies of the Court (who in civil Actions are the Persons that issue all the Process for that Purpose) are bound to take especial Notice, and are also in all Cases to be extremely cautious of taking away the Liberty of a Man's Person, and never for the Sake of Gain, to attempt it without a sufficient legal Foundation or Authority,

ity, not only in regard to Liberty, than which there is not any Thing more precious, but for their own Sakes, as it is at their Peril if they misbehave in this Respect, or cause a Man to be imprisoned unjustly; besides they may, by such a Proceeding, for ever injure his Credit: therefore, as this is a Matter of no small Consequence in the Conduct of an Attorney, some Rules and Instructions will hereafter be given for their Behaviour and Proceedings herein, in treating upon the marking of Writs and special Bail.

*Capias Quominus, Bail Bond,
Appearance and Bail.*

IF the Defendant be not privileged in *Capias Quominus.*
Person, Time, or Place, and if the Plaintiff is not an Attorney, or Clerk of the Court (for he may have an Attachment of Privilege) the Process on which to arrest the Defendant is a Writ of *Capias Quominus*, which may be marked, if the Cause of Action be ten Pounds or upwards, in order to have special Bail; and it must be made returnable on one of the Return Days in Term, and must also be tested in Term. But Note, a Term is not to be passed over in the Return of a Writ.

How to be returned and tested.

It

How to be directed, and how to be marked.

It is to be directed to the Sheriff of the County where the Defendant lives, and if it be marked, it must be set down how the Sum became due, or what the Action is, and the Reason of marking the Writ is, that the Sheriff may be careful what Bail he takes.

When the Sum is due by Bond or Note, &c.

If the Sum be due by Bond, Note, &c. the Attorney for the Plaintiff should take care to have the same delivered to him as his Justification for marking the Writ, it being Penal in him to mark it without such Authority, to be produced to the Court when required.

For Goods sold and delivered, or a Book debt.

If the Debt be for Goods sold and delivered, or any Demand without Note, or Specialty as aforesaid, the Plaintiff should regularly make an Affidavit of the Sum due to him, and upon what Account, before the Writ be marked.

In Actions of Trespass, Assault, or Maihem.

In all Actions of Trespass, Assault, Battery, or Maihem, a Writ is not to be marked for any Sum but by the Directions of the Chief Baron, or, in his Absence, by one of the other Barons, upon a Petition to be preferred to him by the Plaintiff for that Purpose, in which Petition, the several Facts are to be particularly set forth, and also at the same Time, an Affidavit is to be made of the Truth of the same.

It

Cap' Quo' Bail Bond, &c.

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It was ordered by the Court, that for the future, no Writ of *Capias Quominus*, or Attachment to be issued out of the Pleas Office of this Court be mark'd, in order to compell the Defendant to give in special Bail at the Plaintiff's Suit, but by the Plaintiff's Attorney suing out the said Writ; and that the said Attorney mark not the said Writ for special Bail, unless he hath in his Custody some Specialty, Deed, or Indenture under the Defendant's Hand and Seal, or a Bill of Exchange, or do file an Affidavit on Record of some other Debt, which may, by the usual Rules of this Court, enforce the Defendant to enter Bail *de Adjudicat. solvend.* at the Plaintiff's Suit.

24th Nov. 1687.
RULE.
Capias Quominus,
& Attachment.

When the Writ of *Capias Quominus* is thus prepared, it is to be brought to the Clerk of the Pleas Office of this Court in order to have it entered, and signed, and for which, his Fees is 6*d.* and it is to be by him examined before the issuing thereof; and if the same be not issued in manner as aforesaid, the said Writ, nor any Proceedings thereon, are to be accounted any Record of this Court.

12th Feb. 1688.
RULE.
The *Capias Quominus* to be entered, signed, & sealed.

And when it is thus entered and attested, it is then to be brought to the Seal-Office to be sealed, for which the like Fee of 6*d.* is to be paid; and when it is thus signed and sealed, it is to be delivered to the Sheriff of the County to which

To be delivered
to the Sheriff of
the County.

Cap' Quo' Bail Bond, &c.

Warrant.

which it is directed, and thereupon he makes out his Warrant for apprehending the Defendant's Body, for which he is to be paid 2 s. 4 d.

And a Memorandum to be taken thereof,

The Person who delivers the Writ to the Sheriff, should take a Memorandum in Writing of the Time and Manner of delivering it, of the Names of the Parties, and of the Test and Return thereof, in order to make an Affidavit of the Delivery of it, in case the Sheriff should neglect, or refuse to return it.

Four Defendants in one Writ, but separate Warrants.

And note, four Defendants may be put in one Writ, but there must be separate Warrants for each of them.

The Sheriff's Duty upon arresting the Defendant's Body.

When the Sheriff arrests the Defendant, he takes a Bail Bond according to the Writ, either for Appearance, or special Bail, but if the Writ be not marked, upon a Certificate of an Appearance being entered by an Attorney of the Court, the Bail Bond shall be discharged.

Sheriff refusing to take Bail, Defendant may give Bail to the Chief Baron.

If the Defendant offers Bail to the Sheriff upon the Writ, and the Sheriff shall refuse to take the same, the Defendant may give Bail to the Chief Baron, first giving Notice thereof, as is hereafter directed.

Proceed-

Proceedings against the Sheriff for not returning his Process, and also for not bringing in the Defendant's Body.

If the Defendant doth not appear, or give special Bail, (as the Case is) and that the Sheriff makes Delay in returning his Writ (as it often happens when the Bail Bond is not brought into his Office, or where he hath taken insolvent or insufficient Bail; or that he hath let the Defendant escape,) then Affidavit is to be made of the Delivery of it to him; which Affidavit is to be filed in the Pleas Office of this Court, and on an attested Copy thereof, the Plaintiff's Attorney may move the Court the next sitting Day after the Day on which the Writ is returnable, to oblige the Sheriff to return his Writ in two Days on Pain of 40s. Fine; and after a third Fine is obtained, the Court (on Motion) will grant an *Attachment* to the *Pursuivant* against the Sheriff.

Fines against the Sheriff for not returning his Writ.

Attachment to the Pursuivant.

If it should so happen that there are but two Days from the Day on which the second Fine was obtained, before the last Day of the Term, the Plaintiff's Attorney may, on the first of these two Days, move the Court that the Sheriff may return his Writ on the following Day,

Fines against Sheriffs.

Cap' Quo' Bail Bond, &c.

Day, on Pain of a further Fine; and if there should be but one Day before the last Day of Term, he may then move that the Sheriff shall on that Day return his Writ sitting the Court, on the like Pain, which the Court will grant. And in either of these Cases, (if the Sheriff still stands out) he may, on the last Day of the Term, move the Court for an Attachment to the Pursuivant against the Sheriff, and the Court will grant it without further Motion. And these Fines against the Sheriff for not returning the Writ (if the Term will admit of it) are generally carried on farther, and they may be carried on from one Term to another.

Fines against the Sheriff.

The first Fine against the Sheriff for not returning the Writ of *Capias Quominus*, or Attachment of Privilege, or for not bringing in the Defendant's Body, on a *Capi* returned, is 40s. the second 5l. the third 10l. and so on still doubling them: and these Fines are sometimes carried on to eighty Pounds.

Motion on the last Day of Term to fine the Sheriff.

On the last Day of Term, the Plaintiff's Attorney may move the Court to fine the Sheriff if he refuses to return his Writ, or to bring in the Defendant's Body, (as the Case is) sitting the Court.

On a further Fine moved, the last Rule to be produced.

But in all Cases where a Motion is made to impose a further Fine upon the Sheriff, the Plaintiff's Attorney must pro-

Cap' Quo' Bail Bond, &c.

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produce to the Court an attested Copy of the last Rule and Fine.

If it can be proved that the Sheriff hath not taken Bail, or that he hath let the Defendant escape; or that he might have executed his Writ if he had pleased; the Plaintiff may bring an Action on the Case against the Sheriff for an Escape.

Action against Sheriff.

When *Cepi Corpus* is returned, (if there be no Appearance entered, or Bail given) (as the Case is) the Plaintiff's Attorney may (on Motion) obtain a Rule for the Sheriff to bring in the Defendant's Body in a short Day, on Pain of 40s. Fine; and after a third Fine is obtained, he may move for an Attachment to the Pursuivant as is before directed in Page 29.

Attachment to the Pursuivant.

Or on such Return of *Cepi Corpus* (if there be no Appearance or Bail, and the Sheriff brings not in the Defendant's Body) the Plaintiff's Attorney may issue a Writ of *Habeas Corpus Super Cepi*; and if on the *Capias Quominus* the Sheriff shall return a *Cepi Corpus & Languidus in Prifona*, a *Habeas Corpus licet Languidus* may be issued, on which, no Return will be taken but a *Paratum habeo*; and a *Habeas Corpus super Cepi* may issue after the Sheriff has been fined.

Habeas Corpus super cepi languidus in Prifona.

Habeas Corpus licet Languidus. Paratum Habeo.

If the Plaintiff neglects to fine the Sheriff the same Term the Writ is returnable,

Habeas Corpus super cepi, if no Fines against

the Sheriff for not bringing in the Defendant's Body the same Term the Writ is returnable, & the same Sheriff be in Office, & *Disfring. nuper Vic.* if out of Office.

turnable, for not bringing in the Defendant's Body pursuant to his Return, he cannot do it in the next Term; nor can he carry on these Fines for not bringing in the Defendant's Body from one Term to another, but must take out a *Habeas Corpus super Cepi*, if the same Sheriff be in Office; or a *Disfringas nuper Vic.* if he be out of Office.

Fines against the Sheriff for not bringing in the Defendant's Body.

At the Return of all or any of these Writs, the Sheriff, if he neglects bringing in the Defendant's Body, may be amerced, but the first Fine for not returning any of these Writs (which issue for bringing in the Defendant's Body after a *Cepi Corpus* returned) is 5*l.*

Action on the Case against the Sheriff.

Or the Plaintiff may bring an Action on the Case against the Sheriff for a false Return; against whom he may declare as he would have done against the Defendant in case he had appeared or given Bail.

Alias Habeas Corpus Super Cepi.

When a Writ of *Habeas Corpus Super Cepi* issues, and that the Sheriff does not bring in the Defendant's Body, or makes delay in returning his Writ, and that it is so late in the Term that the Plaintiff cannot obtain a sufficient Number of Fines against the Sheriff to entitle him to an Attachment to the Pursuivant; in this Case, the Plaintiff cannot carry on the Fines in the next Term, but

but must issue an *Alias habens Corpus super cepi*.

And if the Sheriff makes delay in returning this last Writ, or brings not in the Defendant's Body in due Time, the Plaintiff may (on an Affidavit of the Delivery thereof) move to fine him as aforesaid: And when he has obtained a third Fine, he may on Motion have an Attachment to the Pursuivant, or on such Default of the Sheriff in not bringing in the Defendant's Body on the *Alias habens Corpus super cepi*, or in returning the Writ, the Plaintiff may (on such Affidavit as aforesaid, and on Motion) obtain a *Pluries Habeas Corpus super cepi*; And on the like Default of the Sheriff on this Writ, the Plaintiff may (upon such Affidavit of the Delivery thereof, and upon Motion thereon as aforesaid) have an Attachment to the Pursuivant without further Motion.

Fines against the Sheriff for not returning it.

Pluries Hab. Cor. super cepi.

Attachment to the Pursuivant.

By Stat. 23 Hen. 6. ch. 10. If the Sheriff returns *Cepi Corpus*, or *Reddidit se*, he shall be chargeable to have the Body of the Party at the Day of the Return of his Writ.

Sheriff chargeable to have the Body ready.

But by this Statute it is only intended, that the Sheriff shall be amerced to the King for not having the Body at the Day.
2 Sand. Co. Postern and Hanson.

A Sheriff out of Office may be fined for not returning his Writ.

If the Sheriff to whom the Writ was delivered be out of Office, and has not returned the same, and a new Sheriff is in his Place, he may notwithstanding be fined on Affidavit of Delivery of the Writ.

Distringas nuper Vic.

But if the Sheriff has arrested the Defendant's Body, and has returned a *Cepi Corpus* on the Writ, but brings not in the Defendant's Body, if he be out of Office, the Plaintiff may (as has been said before) then issue a *Distringas nuper Vic.* directed to the new Sheriff, to restrain the former Sheriff; upon which, the new Sheriff usually returns Issues to the Value of 6s. 8d. sometimes 3s. 4d.

The Issues returnable thereon.

Alias Distringas.

And if the new Sheriff does not bring in the Defendant's Body upon those Issues, the Plaintiff's Attorney may then move on this Writ and Return, that the Issues returned upon the *Distringas nuper Vic.* may be estreated, and that an *Alias Distringas*, &c. may issue; which, (on such Motion) the Court will grant; and on this Writ, the Sheriff usually returns Issues to the Value of 13s. 4d. that is, he generally doubles them after the first Writ.

The Issues thereon.

Pluries Distringas, and the Issues thereon.

And when such Issues are returned upon the *Alias Distringas*, &c. and that the Sheriff has not brought in the Defendant's Body, a Motion be made on this Writ and Return, that the Issues

return-

returned may be estreated, and that a *Pluries Distringas* may be awarded; and on this Writ the Sheriff usually returns Issues to the Value of 1l. 6s. 8d.

And when such Issues are returned upon the *Pluries Distringas*, and that the Sheriff has not as yet brought in the Defendant's Body, the Plaintiff's Attorney may then move upon this Writ and Return to have those Issues estreated, and that an Attachment may issue to the Pursuivant against the former Sheriff without further Motion.

Attachment to the Pursuivant against the former Sheriff.

And note, if the Sheriff in Office, makes Default in returning any of the said Writs of *Distringas*, the Court on Affidavit of the Delivery of the Writ, and on Motion of the Plaintiff's Attorney will fine him; and in such Case, the first Fine is 5l.

If the Sheriff in Office returns not these Writs of *Distringas* the Court will fine him.

If the Sheriff in Office returns a *Nilil* or a *non est inventus* upon the *Distring. nuper Vic.* the Court upon this Return, and upon a Counsellor's Motion thereon, will award an Attachment against the former Sheriff. *Sed Quaer.*

If a *Nilil* or *non est inventus* be returned on the *Distring. Nuper Vic.* the Court will grant an Attachment against the former Sheriff. *Sed Quaer.*

The Sheriffs of every County in the Kingdom, by the Statute of 23d Henry 6th. Chapter 10th. are to appoint Deputies in each of the Courts (who are usually Attornies of the Courts) to transact Business for them during their Continuance

18 May 1688, RULE.

Sheriffs to appoint Attornies by Warrant to transact their Business in the several Courts, which Warrants

are in this Court
to be entered in
the Office of
Pleas.

in Office, and to give them Warrants of Attorney for that Purpose, which Warrants of Attorney, are, by a Rule of this Court of the 18th of *May* 1688, to be entered on Record in the Pleas Office according to the Statute, by the several Attornies so appointed, or upon their Default, the Court will proceed against them for their Neglect and Contempt therein.

No Fines imposed on Sheriffs to be taken off but on Cause shewn by Affidavit for delaying the Writ.

28th *Nov.* 1752. Ordered by the Court that for the future, no Fines imposed on Sheriffs for not returning Writs directed to them, shall be reduced, without producing an Affidavit assigning the Cause wherefore they delayed returning the same.

The Office Fees for filing the Affidavit of the Delivery of the Writ to the Sheriff in order to fine him, for not returning it, and for an attested Copy thereof	} l. s. d. 0 2 0
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If the Affidavit be long, the Officer computes how many Sheets it would make if copied in Office Sheets, and for each Sheet you pay	} 0 0 6
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For an attested Copy of each Rule and Fine	} 0 1 6
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For an Attacht. to the Pursuivant	0 2 0
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For sealing thereof	0 0 6
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Fee for <i>Habeas Corpus super cepi</i>	0 3 4
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For sealing it	0 0 6
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<i>Alias Habeas Corpus super cepi</i>	0 3 4
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For

For sealing it	o o	6
<i>Pluries Habeas Corpus super ce-</i>	}	o 4 10
<i>pi, and Rule</i>		
For sealing it	o o	6
Fee for <i>Distringas nuper Vic.</i>	o 2	o
To the Seal	o o	6
<i>Alias Distringas nuper Vic. and</i>	}	o 3 6
<i>Rule</i>		
To the Seal	o o	6
<i>Pluries Distringas nuper Vic.</i>	}	o 3 6
<i>and Rule</i>		
To the Seal	o o	6
Fees for <i>Habeas Corpus Licet</i>	}	o 3 4
<i>Languidus</i>		
Seal	o o	6

Proceedings against the Pursuivant and Serjeant at Arms to compel them to return their Process,

When an Attachment of Contempt is directed to the Pursuivant, and he neglects to return the same in due Time, you may fine him on an Affidavit to be made, and filed of the Delivery thereof; or if he has taken the Defendant, and refuses to bring in his Body, you may also fine him: And in either of these Cases the Fine is 5*l*. And when a third Fine is obtained, you may then move to have him committed to the Marshal of this Court.

Proceedings against the Pursuivant.

And on such Motion, a Rule is conceived, that the Pursuivant shall stand committed to the Marshal of the Court, an attested Copy of which Rule is to be

Pursuivant committed to the Marshal of the Court.

Proceedings against the Marshal for not returning the Rule of Commitment.

Marshal of this Court committed to the Marshal of the Four Courts.

Marshal not bringing in the Pursuivants Bondy.

Court may suspend the Pursuivant or Marshal.

R U L E.
5th June, 1713.
Serjeant at Arms and Pursuivant to be paid their Fees if they send out their Messengers notwithstanding any Discharge thereto.

delivered to the Marshal, and if he does not return the same in a reasonable Time, you may (on an Affidavit of the Delivery of the Rule) move that he may return the same in two Days upon Pain of 5*l.* Fine. And when a third Fine is obtained, and that the Marshal of this Court has not returned the Rule, the Court (on Motion,) will order that he shall stand committed to the Marshal of the Four Courts unless he returns the Rule for committing the Pursuivant in a short Day, without further Motion.

The like Proceedings are against the Marshal, if he returns that he has taken the Pursuivant, and neglects, or refuses to bring him in to be committed by the Court.

The Court may also in their Discretion suspend the Pursuivant, or Marshal, for refusing to do their Duty.

Ordered on the Petition of the Serjeant at Arms and Pursuivant of this Court, that when Attachments do issue respectively to the said Serjeant at Arms, or Pursuivant, and that in Obedience thereto, they respectively send down their Messengers to execute the same, no Discharge or Consent, from any Attorney of this Court, or his Client only, shall be of any Avail, or hinder the Execution of the said Attachments, unless

less their respective Fees be first paid; and that no Person or Persons so to be taken on any Attachment, shall be discharged by the Serjeant, or Pursuivant, until the said Person or Persons do first produce to them a Superfedeas under the Seal of this Court; and that the respective Officers of said Court do Issue no Superfedeas to such Attachment without the Person so suing for the same do first Pay the said Serjeant at Arms, or Pursuivant respectively, their respective, usual, and due Fees; and that until they are paid their said Fees the said Serjeant and Pursuivant shall be at Liberty to renew the said Attachments, notwithstanding the Attorney to such Contempts shall not renew, or consent to the renewing the same.

Ordered that the Serjeant at Arms and Pursuivant of this Court shall not for the future, Issue any Execution or Executions, upon Judgment or Judgments obtained, or to be obtained at either of their Suits, or the Suits of their Deputies upon Bonds taken, or to be taken by either of them for their Fees, without first applying to the Court in Term, or to the Barons in Vacation-Time, for their Directions and Approbation, of the Sum to be mark'd at the Foot of such Execution or Executions.

R U L E,
5th February,
1740.
Pursuivant and
Serjeant at
Arms not to is-
sue Executions
but by the Direc-
tions of the
Court, or in Va-
cation time of a
Baron.

The Proceedings against the Serjeant at Arms, to compel him to return his

Proceedings a-
gainst the Ser-
jeant at Arms
the

the same as against the Pursuivant.

Writ, or to bring in the Defendant's Body, are the same, as the Proceedings against the Pursuivant.

Of the Sheriff's Bail-Bond and Proceedings thereon.

The Sheriff obliged to take Bail.

When the Sheriff arrests any one, he is not only authorised, but obliged to take Bail, otherwise an Action on the Case lies against him. 2 *Saund.* 59. 1 *Vent.* 55. 85. 1 *Mod.* 33. 1 *Salk.* 99. 6 *Mod.* 122. 1 *Bac. Abr.* 206.

What Persons he may let to Bail.

This the Sheriff is obliged to, by the 23 *Hen.* 6. ch. 10. which enacts, that Sheriffs, Coroners, &c. shall let to Bail Persons by them arrested, or in their Custody, by Force of any Writ, Bill, or Warrant, in any personal Action, or because of any Indictment of Trespass, upon reasonable Sureties (having sufficient within the County) to keep their Days in such Places, &c. as the Writ &c. require, (such as are in Ward by Condemnation, Execution, *Capias Attagatum*, or Excommunication, Surety of Peace, or committed by Command of the Justices, and Vagabonds refusing to serve according to the Statute of Labourers only excepted.)

What Obligation, and in what Form, the Sheriff shall take of them that he doth let to Bail

And that no Sheriff, &c. shall take, or cause to be taken, or make any Obligation for any Cause aforesaid, or by Colour of their Office, but only to themselves,

selves, of any Person, nor by any Person which shall be in their Ward by the Course of the Law, but by the Name of their Office, and upon Condition written, that the said Prisoners shall appear at the Day contained in the said Writ, Bill, or Warrant, and in such Places as the said Writ, Bill, or Warrant shall require.

for their Appearance.

But though the Sheriff be obliged to take Bail, yet if the Plaintiff dislikes the Security, and does not take an Assignment of the Bail Bond, he may have the Defendant brought up; for the Sheriff having arrested the Party, must return a *Capi Corpus*, on which Return, it is a Breach of Duty in him not to bring up the Defendant, for which the Court amerces him as one of their Officers. *1 Vent. 85. 1 Mod. 33. 57. 244. 1 Bac. Abr. 206.*

Sheriff may bring up the Defendant's Body if the Plaintiff refuses to take an Assignment of the Bail Bond.

It is by 7 *Wil. 3. ch. 25.* enacted, that no Person to be arrested on any Process (in which the Certainty of Action is not expressed, and in which the Defendant is bailable by the 23 of *Hen. 6.*) shall be compellable to give Bond with Sureties for his Appearance in the Penalty of above 40*l. Eng.* to be conditioned for such Appearance: And all Sheriffs and other Officers, shall let such Prisoners to Bail, upon such Security given to them.

Where the Writ is not marked, Bond for Defendant's Appearance not to exceed the Penalty of 40*l.*

And

And upon Appearance by Attorney, Bail Bond to be discharged.

And upon Appearance entered for them at the Return of the Process, by an Attorney in the Court from whence it issues, the Bail Bond shall be discharged, and after such Appearance, no Amerciements shall be estreated against the Sheriff or other Officer.

Not to extend to Attachments upon *Rescous*, upon Contempt or of Privilege.

This Act not to extend to any Arrests made upon any Attachments upon *Rescous*, or upon any Contempt, or of Privilege at the Suit of any privileg'd Person, or of any other Attachments of Contempt whatsoever, although there be no particular Certainty of the Cause of Action therein expressed, but that such lawful Course be taken for Security for a Appearance therein, as hath been heretofore used.

If the Writ be marked Defendant to give Bail for double the Sum.

But if the Writ be marked ten Pounds, or upwards, the Sheriff must take a Bail Bond from the Defendant, for double the Sum marked at the Foot of the Writ; and in this Case the Bail Bond is not to be discharged unless the Defendant give special Bail to the Court, or that he be committed by the Court for want of Bail; or that the Defendant has obtained a Rule for his Appearance to stand for want of the Plaintiff's shewing Cause of Bail, the Defendant having before put a Rule on him for that Purpose.

If

If the Plaintiff takes an Assignment of the Bail Bond, the Sheriff is not amerciable; for by accepting of the Bond the Plaintiff has waived the Benefit of the Amerciament, and he may bring an Action upon the Bond, but formerly he could only sue in the Sheriff's Name, and if the Sheriff released the Action, his Remedy was in a Court of Equity. 1 Salk. 99. 6 Mod. 122. 1 Bac. 206.

If the Plaintiff takes an Assignment of the Bail Bond, the Sheriff not amerciable.

But now by the 6 Ann. ch. 10. pars. it is enacted, that if any Person be arrested by any Process, out of any of the Four-Courts at *Dublin*, at the Suit of any common Person, and the Sheriff, or other Officer taketh Bail for such Person, the Sheriff or other Officer at the Request and Cost of the Plaintiff or his Attorney, shall assign to the Plaintiff the Bail Bond, or other Security taken from such Bail, by indorsing the same, and attesting it under his Hand and Seal in the Presence of two or more Witnesses.

Bail Bond assignable.

And if such Security taken for Bail be forfeited, the Plaintiff after such Assignment may bring an Action thereupon in his own Name.

And Action thereon in Plaintiff's own Name.

And the Court where the Action is brought, may by Rule or Rules relieve the Plaintiff, or Defendant in the original Action, and the Bail upon the Bail Bond, as is agreeable to Justice; and such

Court may relieve by Rules.

such Rules shall have the Nature and Effect of a Defeazance to such Bond.

Bail Bond may be sued by the Executor of the Assignee.

Upon the Death of the Assignee of the Bail Bond, the Right of Action devolves to the Executor; for the Statute designed a Benefit to the Plaintiff, and not a Prejudice, and there are no negative Words in the Statutes. *Pract. Reg.* 68.

Defendant and Bail to give special Bail if arrested on the Assignment of the Bail Bond by Plaintiff but not, if sued in the Sheriff's Name.

When the Sheriff has assigned the Bail Bond as aforesaid, the Plaintiff may then arrest the Defendant and the Bail on the said Bond in his own Name by Virtue of the aforesaid Statute, and require special Bail in that Action also; which he cannot do if he sues in the Sheriff's Name. *Inst. Legal.* 24.

For the Defendant to stay Proceedings on the Bail Bond, where the Writ is marked.

The best Course for the Defendant to stay Proceedings on the Bail Bond, is to put in good Bail if the Writ required it; and then (upon proper Notice given) he may move the Court by his Attorney, that the Proceedings on the Bail Bond may be stayed, and that the Officer may tax the Costs thereon; which Motion the Court will grant upon the Defendant's engaging that he will not delay the Plaintiff, but that he will forthwith pay the Costs on the Bail Bond, and also plead to Issue as soon as a Declaration shall be filed in the original Action.

But

But if the Defendant, is sued on the Sheriff's Bond for not appearing, and if the Plaintiff's Attorney will not otherwise agree, when the Defendant has appeared, his Attorney may move the Court as in the former Case, and the Court will make the like Rule upon the same Conditions. *Inst. Legal.* 25. *Sed. Vide.* 6 *Ann.* ch. 10. in Page 43.

For the Defendant to stay Proceedings on the Sheriff's Bond, for the Defendant's Appearance only.

In the Case of *Anderson*, Attorney, against *Eustace* in this Court, *Trinity Term*, 1745; the Sheriff of the County of *Kildare*, having taken the Defendant's Body on a mark'd Writ at the Plaintiff's Suit, took a Bail Bond for his Appearance, and returned a *Cepi corpus* on the Writ. The Plaintiff then issued a *Habeas corpus super cepi*, and the Sheriff not returning this last Writ, the Plaintiff fined him: Whilst the Fines were carrying on, the Sheriff moved the Court that the Plaintiff should be compelled to take an Assignment of the Bail Bond, as the same had been tendered to the Plaintiff by the Sheriff, before the *Habeas corpus super cepi* issued, and that the Fines may be set aside; but the Court refused to grant any Part of the Motion, for that the Plaintiff cannot support an Action at Law against the Sheriff for taking insufficient Bail, as by Act of Parliament he is obliged to take Bail, therefore the Court will not hinder

The Court will not oblige the Plaintiff to take an Assignment of the Bail Bond.

hinder the Plaintiff from fining the Sheriff to compel him to bring in the Defendant's Body, which may be the best Remedy the Plaintiff has for recovering his Debt: And the Court upon Motion of the Plaintiff's Attorney, upon an attested Copy of the last Rule and Fine, (it being a third Fine) granted an Attachment to the Pursuivant against the Sheriff.

Fines carried on against a Sheriff, pending a Notice.

In this Case the Plaintiff proceeded on his Fines, pending the Notice of the Motion, and the Court held it regular.

The Sheriff cannot himself commit the Defendant to the Marshalsea of the Four Courts, he is only to bring up the Defendant's Body to the Bar of the Court, and the Court will commit him.

The Sheriff cannot himself commit the Defendant to the Marshalsea or Gaol of the Four Courts, he is to keep him in his own Gaol, and is answerable for him until the Court disposes of him, and for this Purpose he must bring up the Defendant's Body to the Bar of the Court, and if he cannot find Bail, the Court will commit him to the Custody of the Marshal of the Four Courts; and this Committal is entered in the Rule-Book.

A Defendant may by *Habeas corpus cum causa*, remove himself from a County Gaol, or from the Sheriff's Custody to the Marshalsea of the Four Courts.

If the Defendant would be removed from the Sheriff's Custody, to the Marshalsea of the Four Courts, he may bring a *Habeas corpus cum causa*, returnable either in Term, or if it be vacation Time, before the chief Baron at his House, or in his Absence, before any of the other Barons; and when the Defendant

dant is brought up thereon, he shall be committed as aforesaid. And in all Cases where a Defendant is arrested in the Country, and is to be brought up by the Sheriff to be committed to the Marshalsea of the Four-Courts, the Court on Application of the Sheriff will order a reasonable Sum to be first deposited in his Hands by the Party who procures the Removal to defray the Expences of bringing the Defendant to *Dublin*. But the Plaintiff may, if he will, declare against the Defendant in Custody of the Sheriff; and the Court on Motion of the Defendant's Attorney will oblige the Plaintiff to declare against the Defendant so in Custody in a reasonable Time, or they will discharge him out of Custody. See the running Title *Declaration* and *Habeas Corp. cum causa*.

A reasonable Sum to be first lodged with the Sheriff to defray the Expences of the Removal.

Plaintiff may declare against the Defendant in Custody of the Sheriff.

And the Court will at the Instance of the Defendant oblige him to do so.

And note, by the present Practice, where a Defendant is arrested in vacation Time, and would be removed from the Custody of the Sheriff to the Marshalsea of the Four-Courts, he may take a Habeas Corpus out of this Court returnable before one of the Barons, altho' the Writ on which the Defendant was arrested issued out of the Court of King's Bench, or Common Pleas; so likewise the Habeas Corpus may issue in this Case out of the King's Bench, or Common Pleas, altho' the Writ on which the Defendant was arrested issued out of this Court.

Habeas Corpus to remove a Defendant from the Custody of the Sheriff to the Marshalsea of the Four Courts, may be before any Judge of any of the Courts, tho' the Writ on which the Defendant was arrested issued out of another Court.

If

Non est inventus returned, and the Proceedings, where it appears to be a false Return.

Attachment to the Pursuivant.

Action against Sheriff.

Writ to the Coroner.

If the Sheriff returns a *Non est inventus*, upon the Writ of *Capias Quominus*, and the Plaintiff can make it appear by Affidavit, that it is a false Return, and that the Sheriff has taken the Defendant, or Bail for him; or that the Sheriff, or Under-Sheriff hath been seen in his Company; or that he is a publick or noted Man living in the County, or County of the City, or Town, to the Sheriff, or Sheriffs of which, the Writ was directed; and that he appears publickly abroad, without any Restraint, the Court (upon Motion) will oblige the Sheriff to shew Cause in a short Day, why he should not amend his Return upon a Pain; or perhaps upon this Motion, they will grant an Attachment to the Pursuivant against him unless Cause as aforesaid. See, *Instr. Cleric.* Vol. 2d. p. 127. where it is said that in this Case, you may bring an Action on the Case against the Sheriff for an Escape.

Of directing Writs to the Coroners.

By 6 Ann. ch. 7. Where any Sheriff shall on any mesne Process, or Execution, return a *Non est inventus*, or *Nulla bona*, the Plaintiff may take out the same, or any mesne Process, or Execution, to all or any of the Coroners of the said County, who may execute the same without any further Directions or Regard to the Sheriff; and thereupon the Coroner shall

Person so taken on mesne Process, as the Sheriff might have done; and shall be liable to an Action, in case of any Escape. And the said Coroner shall take such Fees, and no other or more for Execution of the said several Writs, than as by this Act is appointed.

And if the Coroners shall commit any Person so taken by them to the County Gaol, the Gaoler shall receive and detain him:

The Gaoler of the County to receive the Person committed.

And Note, when the Sheriff has returned a *Non est inventus*, or *Nulla bona*, upon any *mesne Process*, or Execution, such Process or Execution with the Return, must be first filed in the Pleas Office of this Court, before a Writ shall issue to the Coroner or Coroners.

The Writ on which the *Non est inventus* or *Nulla bona* is returned, to be filed before a Writ issues to the Coroner.

If a Sheriff, or other Officer, shall arrest the Defendant and take his Body on any mesne Process, and that the Defendant be rescued; the Sheriff, &c. may return the Rescue, and such Return is good, and no Action of Escape lies against him after such Return; but the Court will issue Process against such Rescuer or Fine him: But on a *Capias ad Satisfaciendum*, such a Return is not good, and an Action for an Escape will lie. *Moor* 852. *Cro. Jac.* 419. 1 *Roll. Rep.* 388. 440. *Cro. Eliz.* 868. 3 *Lew.* 46. *Dalk. Sher.* 165. 216. 217.

Rescue may be returned upon mesne Process but not upon judicial.

Capias ad Satisfaciendum.

The Reason.

The Reason is, that the Defendant can give Bail to mesne Process, and every Man is presumed to have Bail ready, and so to be forth-coming; and therefore the Sheriff is not obliged in Duty to take the *Posse Comitatus* to assist him: but when Judgment is passed, and the Defendant and his Bail don't surrender him, nor pay the condemnation Money, and then a *Capias* issues to which there can be no Bail; there its presumed that he will not be forth coming, because neither he nor his Bail have satisfied the Judgment; and therefore, there the Sheriff ought to take the *Posse Comitatus*; and consequently, it cannot be a good Return that he took the Body, but that it was rescued. And the Party may have an Action of Escape against the Sheriff on this Return, or a new *Capias*; for the Return of an ineffectual Execution is as none: but if the Sheriff had permitted him to go at large he could have had no new Execution; for an effectual Execution is returned, and so there is a Pledge for Satisfaction in the Custody of the Sheriff, for which he is only answerable. 1 Roll. 904. Cro. Car. 240. 255. 8 Co. 142.

Appearance.

If the Defendant appears upon Process of *Quominus* not marked, the * Appearance

Four Ways of appearing.

* There are four Ways for a Defendant's Appearance to Actions, viz. in Person, by Attorney, Guardian or next Friend; the two first are common Ways, the latter Privileges given to Infants.

pearance stands good without any
* Bail.

But if the Writ be marked 10*l.* or upwards, and that the Sheriff has arrested the Defendant, and has taken Bail for him, or that he has him in Custody, his Attorney is then to call upon the Sheriff for the Writ with the *Cepi Corpus* returned thereon, and when he has entered an Appearance for the Defendant, he may then move upon the Writ and return that the Plaintiff may

Rule on Plaintiff to shew Cause of Bail upon Motion on the Writ and Return.

E 2

shew

* Bail, *Ballium* (from the *French Ballier* which comes of the *Greek Βαλλειν* and signifies to deliver into Hands) is used in our common Law, for the freeing or setting at Liberty one arrested or imprisoned, on any Action Civil or Criminal, on Surety taken for his Appearance at a Day and Place certain. *Bract. Lib. 3. Tract. 2. ch. 8.*

Bail what.

The Reason why it is called Bail, is because by this Means the Party restrained is delivered into the Hands of those that bind themselves for his forth coming, in order to a safe Keeping or Protection from Prison. See *Jacob's Law Dictionary, Tit. Bail.*

Why so called.

And Note there is both common and special Bail: common Bail is in Actions of small Concernment, being called common, because any Sureties in that Case are taken; whereas in Actions of greater Weight, as Actions upon Bond, or Specialty, &c. where the Debt amounts to 10*l.* and that the same is really and justly due, special Bail or Sureties must be taken.

Common and special Bail.

But in this Court instead of common Bail, the Defendant enters an Appearance to the Plaintiff's Suit by an Attorney of the Court, in the Book of Appearances, which is kept for that Purpose in the Office of Pleas, the Fee of which is 1*s.*

In this Court an Attorney's Appearance instead of common Bail.

Cap' Quo' Bail Bond, &c.

shew § Cause of Bail in two Days or that the Defendant's Appearance may stand, but if the Sheriff has filed the Writ and Return, the Defendant's Attorney is then to move upon an attested Copy thereof which he is to get in the Office of Pleas, and to pay for it, 1s 6d.

Defendant in
Custody and
Writ not return-
ed.

If the Defendant be in Custody, and the Sheriff has not returned his Writ, (as it often happens when the Defendant is arrested and imprisoned in the Country) then, upon an Affidavit made and filed of the Defendant's being in Custody, a Motion may be made for the Plaintiff to shew Cause of Bail as aforesaid.

If no Cause of
Bail Defendant's
Appearance to
stand.

And the Plaintiff or his Attorney is to be served with an attested Copy of this Rule, and if the Plaintiff doth not in two Days after such Service shew sufficient Cause for the Defendant's giving Bail, then, upon * Motion of the Defendant.

§ To shew Cause of Bail is to shew to, and satisfy the Court what Sum is due by the Defendant to the Plaintiff, and how it became due.

* The Court will grant this Motion upon producing an attested Copy of the last Rule only, and without requiring an Affidavit of the Service thereof, or a Certificate of no Cause of Bail, but it stands the Defendant upon to be at all Times able to prove the Service of the Rule; for if the Plaintiff should say he was not served, and move to have the regularity of the Proceedings referred to the Officer, and that the Defendant could not prove the Service, the Defendant's Proceedings in this Case would

pendant's Attorney upon an attested Copy of the last Rule, the Court will order the Defendant's Appearance to stand; and if the Defendant be in Custody the Court will also order that the Defendant may be discharged out of the Custody of the Sheriff, and in either of these Cases, upon producing to the Sheriff an attested Copy of the Rule, and also a Certificate of the Defendant's Appearance being entered, if the Defendant be in Custody, the Sheriff must discharge him, and if he has taken Bail for the Defendant, he must give up the Bail Bonds.

Ordered, that in all Cases for the future, where a Writ is marked for special Bail, pursuant to the Statute, the Defendant's Appearance by his Attorney without Bail upon the said Writ be not entered and accepted of without a Rule of Court of four * Days to be given the Plaintiff to produce his Cause of Bail; and the Plaintiff may enter a *Ne Recipiat* as formerly, notwithstanding such Appearance.

RULE.
14th Nov. 1688.
The Defendant's Appearance not to be accepted, unless he puts a Rule on the Plaintiff to shew Cause of Bail.

And tho' an Appearance Plaintiff may enter a *Ne Recipiat*.

E 3

And

would be set aside for Irregularity: and note, That in this Side of the Court Certificates of no Cause or Affidavits of the Service of Rules are seldom required in any Case.

* Now two Days is the Practice.

RULE.

13th June, 1722.

The Rule to
shew Cause of
Bail to be served
before it be made
absolute.

And by this Rule it was ordered, where-ever a Person moves that the Plaintiff may shew Cause of Bail, before he moves to make it absolute, that an Appearance shall stand, that he serves the Plaintiff's Attorney with a Copy of the Rule.

Defendant to
give Bail if the
Plaintiff shews
Cause of Bail,
and Plaintiff may
immediately pro-
ceed to fine the
Sheriff.

But if the Plaintiff does shew Cause of Bail, and that the Court approves of the same, a Rule is thereupon entered, that the Defendant shall give Bail, and in this Case the Plaintiff may (if he will) proceed immediately to fine the Sheriff, to oblige him to bring in the Defendant's Body; but generally the Plaintiff gives the Defendant some reasonable Time to give Bail, before he proceeds to fine the Sheriff.

Plaintiff may
shew Cause of
Bail, tho' the
Rule for that
Purpose be not
served.

If the Rule to shew Cause of Bail be not served, and the Plaintiff's Attorney would forward the Suit, he may take out an attested Copy of this Rule (without which he cannot move) and thereupon, and upon an attested Copy of the Affidavit of the Cause of Bail as aforesaid, he may move the Court, who will allow or not allow the Cause as they see fit.

Time for shewing
Cause of Bail
enlarged.

Upon Motion of the Plaintiff's Attorney, and upon Cause shewn, the Court will enlarge the Time for shewing Cause of Bail, but not where the Defendant is in Custody, but upon very good Reasons

to

to be offered by the Plaintiff, for the Law is very tender of the Liberty of a Man.

If the Demand be by Bond, Note, or written Agreements, the Plaintiff's Attorney is to produce it to the Court: If it be on a verbal Agreement, or Book Debt, or for Goods sold and delivered, there must be an Affidavit made thereof, and of the Sum that is due by the Defendant to the Plaintiff: If it be an Action for Performance of Covenants, then, producing the Bond or Article, an Affidavit must be made of the Breach of such Covenant, and of the particular Damages which the Plaintiff hath sustained thereby, and it must appear to the Court that the same amounts to the Sum of 10*l*.

The Manner of shewing Cause of Bail.

In Actions of Battery, Trespass, Slander, &c. tho' the Plaintiff is like to recover large Damages, special Bail is not to be had unless by Order of Court, and the Process be marked for special Bail; nor is it required in Actions of Account, or of Covenant except it be to pay Money. *Dan. Abr.* 681. And in all Actions upon any penal Law, the Defendant is to put in but common Bail. *Yelv.* 53.

In what Cases Bail is required.

In all Actions where Damages are uncertain, Bail is to be had at the Discretion of the Court; on a dangerous Assault and Battery, upon Affidavit of special Damages, the Defendant will be

Assault and Battery.

obliged to give Bail if the Writ was marked for it. And in Actions of *Scandalum Magnatum*, the Court, on Motion, have ordered special Bail. *Raym.* 74.
1 *Bacon* 209.

Debt on Bond
alleged to be by
Durefs, yet De-
fendant to give
Bail.

In an Action of Debt on a Bond, tho' the Defendant says it was by *Durefs*, or an usurious Contract, yet there shall be special Bail; for the Merits of the Cause shall not be determined on a Motion, neither will the Court put a Slur upon the Plaintiff's Cause which ought to come fairly to Trial without Prejudice.
1 *Salk.* 100. 1 *Bacon* 210.

No Bail on a pe-
nal Statute.

On a penal Statute, the Defendant is not held to Bail, because the Penalty on a Statute is in the Nature of a Fine or Amerciament set on the Party for an Offence committed, and therefore no Person ought to suffer any Inconvenience by such Law, until he be convicted of the Offence. 1 *Bacon* 210.

Bail on a *Habeas*
Corpus cum causa,
or a *Procedendo*.

In all Causes removed by *Habeas Corpus cum causa*, from inferior Courts, special Bail is to be given, or the Court on Motion, will award a *Procedendo*, except where a Defendant is sued as an Heir, Executor, or Administrator; this they do in Favour and Indulgence to inferior Courts. 1 *Salk.* 98.

Officers and At-
tornies of the
Court not to give
special Bail.

An Attorney or other Officer whose Attendance is required in the Court to which

which he belongs, shall not be held special Bail.

An Heir, Executor or Administrator, shall not be held to special Bail, for the Demand is not on the Person, but on the Assets of the deceas'd, and it would be unreasonable to subject their Persons to Imprisonment for the Debt of another.

Nor Heir, Executor or Administrator.

But in an Action of Debt on a Judgment, suggesting a *Devastavit*, an Executor, or Administrator must find special Bail, for there the Action is in the *Debet* & *Detinet*. 1 Salk. 98.

Unless upon a *Devastavit*.

And where an Action of Debt is brought for Rent, accrued due since the Death of the Testator, or Intestate, in that Case an Executor or Administrator is to give special Bail.

Or for Rent due since the Death of the Testator, or Intestate.

Where an Action is brought upon a Judgment, if Bail be given in the original Action, there is no need of Bail in the Action upon the Judgment: But if no Bail be given in the original Action, then there must be Bail on the Action on the Judgment. *Pract. Reg.* 56.

Action on Judgment no Bail to be given, if Bail be in the Original Action, aliter, if no Bail.

And if the Bail in the original Action be discharged by having surrendered the Defendant, then Bail shall be put in to the Action of Debt on the Judgment, for in this Case it is the same as if no Bail

Or if the Bail be discharged by surrendering the Defendant.

Bail had been put in, to the original Action. *Ibid.* 57.

Bail must be put in on Debt upon a Judgment if no Bail in the original Action, tho' Bail be put in on a Writ of Error brought.

Where a Defendant brings a Writ of Error to reverse a Judgment, and puts in Bail thereto, and, pending the Writ of Error the Plaintiff in the original Action brings an Action of Debt on the Judgment; if in this Case there be no Bail in the original Action, altho' Bail be put in on the Writ of Error, yet the Defendant must put in Bail to the Action upon the Judgment. *Idem* 57.

Bail always given on an Attachment of Privilege.

On every Writ, or Attachment of Privilege at the Suit of the Officers, or Attornies of the Court, the Defendant by Reason of the Plaintiff's Privilege, shall be obliged to give Bail, though the Debt be but 40s. *See* p. 404. Title *privileged Persons*.

Bail before a Baron 24 Hours Notice thereof.

On giving Bail before a Baron, the Defendant's Attorney is to give the Plaintiff's Attorney 24 Hours Notice thereof in Writing; and must mention in such Notice, the Hour of the Day, and before which of the Barons the Bail is to be given; and must also set forth the Names, Places of Abode, and Addition of each Person who is to become Surety for the Defendant, that the Plaintiff may have an Opportunity of inquiring into the Ability of the Bail, their Repute, way of Dealing and Credit.

If

If the Defendant does not attend on his Notice of Bail, the Attorney for the Plaintiff may move the Court, that the Defendant may not be at Liberty to give Bail, until he pay the Cost of the Attendance on the Notice; and on this Motion the Court will grant a Rule for that Purpose. So ordered in this Court in the Case of *Flanagan* against *Barton*, 2d. June, 1749.

If Defendant does not attend on his Notice, he shall pay the Cost before he can give Bail.

The Plaintiff may object to the Bail, if the Persons tendered be Attornies, or if they be Prisoners at large, or protected; charged with Crimes which may incur a Premunire, privileged Persons, or if they purpose going beyond Seas.

For what Plaintiff may object to the Bail.

A Defendant with Leave of the Court may depostite Money in Court instead of Bail; and in such Case the Plaintiff shall be ordered to waive other Bail. *Lill. Abr. 23 Car. B. R.*

Money deposited in Court instead of Bail.

The Bail and each of them, are to swear themselves worth double the Sum, which the Plaintiff has made appear to be due to him; and they jointly, and severally, engage, promise and undertake, that if Judgment be given for the Plaintiff, for any Debt, or Debts, Damages and Costs, that then the Defendant shall pay unto the Plaintiff all such Debt, or Debts, Damages and Costs, as shall be adjudged to, or recovered by the Plain-

How and in what manner the Bail are bound, and the Meaning of *Bail de adjudicatis solvendis*.

Plaintiff against the Defendant, or that the Defendant shall render his Body in Execution for the same, or that they, and each of them, as *Bail de adjudicatis solvendis* shall so do and perform.

One Person not to be taken as Bail, nor Bail to be taken without Oath but by Consent.

One Person is never taken for Bail, unless it be by Consent of the Plaintiff, or his Attorney; and the Bail are always to be sworn, unless there be a Consent (as aforesaid) to have them taken without Oath.

RULE.
17th Nov. 1683.
Officers of the Revenue exempt from giving Bail in Actions of Trespafs, or Trespafs on the Case.

Ordered for the future, that in all Causes wherein any of the King's Officers or Ministers employed about his Majesty's Revenue are impleaded upon Actions of Trespafs, or Trespafs on the Case, the Appearances of such Defendants by their Attornies are to be received and entered without Bail *de adjudicat. solvend.* entered in the Court.

19th Nov. 1709.
RULE.
Bond for 10*l.* if but 20*s.* of the Principal be due, Bail is to be given.

Ordered for the future, that if any Person be indebted by Bond for Payment of Money, the Penalty being 10*l.* or upwards, if, in such Case, there be 20*s.* or more of the principal Money due, every Person so indebted as aforesaid shall be obliged to give Bail to any Suit commenced in this Court against them.

20th June 1711.
RULE.
Attornies not to be Bail.

The Court taking into Consideration the many Inconveniencies that have happened, by allowing Attornies of the Court of Exchequer to be Bail in Actions hereto-

heretofore brought, (for the Prevention of which for the future) it is hereby ordered by the Barons of the Court, that no Attorney of the said Court, nor any Attorney of any Court, be admitted Bail in any Action whatsoever to be brought or commenced in the said Court.

Ordered, that all Attornies do themselves come to the Office and sign all Appearances that they shall have Occasion to enter.

1st Feb. 1714.
RULE.
Attornies to sign Appearances.

Ordered, that all Persons who shall become Bail *de adjudicatis solvendis*, shall sign their Names at the Foot of the Bail Piece.

28th Jan. 1728.
RULE.
The Bail to sign their Names at the Foot of the Bail Piece.

When an Appearance is entered, it cannot be vacated without Leave of the Court, and the Plaintiff is to have Notice of the Motion; for he has a Right to the Appearance when entered, and the Defendant shall not discharge himself without the Plaintiff's having an Opportunity to oppose it.

When an Appearance is entered, it cannot be vacated without Leave of the Court.

When the Defendant is arrested in the Country, and he can more readily give Bail there, either to Commissioners, or at the Assizes, than in Town, in such Case, the Court, upon Motion of the Defendant's Attorney, will give the Defendant Liberty to give Bail before Commissioners in the Country, to be appointed as by the Statute of 7 Will. 3. is directed,

Bail at the Assizes, or before Commissioners in the Country.

or

Cap' Quo' Bail Bond, &c.

or at the Assizes, if it be an issuable Term. And note, before such Bail be received, an attested Copy of the Rule for giving such Bail is to be produced by the Defendant or his Attorney.

On Bail at the Assizes, or before Commissioners, Motion to be made for allowing it.

By the Practice of this Court, when Bail is given before a Judge at the Assizes, or before Commissioners in the Country, the Defendant's Attorney is to get the Bail Piece, and thereupon he is to move the Court the first Opportunity after such Bail is taken, to have the same allowed, and the Court will accordingly grant a Rule for allowing the same, unless Cause be shewn to the contrary in four Days after Service of the Rule; and if no Cause be shewn in that Time, upon a second Motion, and upon an Affidavit of the Service of the Rule, the Court will confirm the Bail.

Bail before Commissioners Affidavit to be of the Truth of the Recognizance.

If the Bail be taken by Commissioners, an Affidavit is to be made and produced of the true making of the Recognizance, pursuant to the afore said Statute.

Consent for allowing the Bail.

If the Plaintiff's Attorney consents that such Bail be allowed, then, upon Motion of the Defendant's Attorney upon such Consent the Court will order the Bail to be allowed without further Motion.

It

It is enacted by 7th Will. 3. 18. That the Chief Justices and other Justices of the King's Bench, or any two of them, whereof the Chief Justice to be one, and so of the Common Pleas, and the Chief Baron and Barons of the Exchequer, or any two of them, whereof the Chief Baron to be one, may, by Commission under the Seals of their respective Courts (as often as Need requires) impower so many Persons (other than common Attornies and Solicitors) as shall be fit and necessary in all Counties in *Ireland*, to take such Recognizances of Bail, as any shall be willing to acknowledge before them, in any Action depending in any of the said Courts, in such Manner and Form, and by such Bail Piece as the Justices and Barons of the said Courts have used to take the same; which said Recognizances shall be transmitted to some or one of the Justices or Barons of the said Courts, where such Suit shall be depending, and upon Affidavit made of the true making thereof, by some credible Person that was present, such Chief Justice, or Chief Baron, Justice or Baron, shall receive the same upon paying the usual Fees; and the same shall be of the like Effect, as if taken *de bene Esse*, before any of them. The Commissioners are to take two Shillings and no more for taking such Recognizances of Bail, and for every such

Who may grant
Commissions to
take Bail in the
Country.

Who may be
made Commissi-
oners to take Bail
in the Country.

An Affidavit to
be made of the
true making of
the Recognizance
of Bail.

Fee for taking
Bail.

Fee for the Commission.

such Commission to impower them shall be paid 13s. 4d. and no more.

The Judges and Barons to make Orders herein.

And the Justices and Barons respectively in the several Courts are to make such Rules for justifying of such Bails, and making the same absolute, as they think fit, so as the Cognizors thereof be not compellable to appear in Person in any of the said Courts to justify themselves, but the same to be determinable by Affidavits duly taken before the said Commissioners, who may examine the Sureties upon Oath touching the Value of their Estates, unless they live within the City of *Dublin*, or within ten Miles thereof. Any Judge in his Circuit also may take Bail to be transmitted as aforesaid, and to be received without Oath, upon Payment of the usual Fees.

Any Judge in his Circuit may take Bail.

Felony for any Person to represent, and be Bail in another's Name.

If any shall personate another, before any Commissioners impowered to take Bails, whereby the Person so personated, may be liable to the Payment of the Debt, or Damages to be recovered in the said Suit wherein he is personated, the Offenders (being lawfully convicted thereof) shall be adjudged Felons, and suffer the Pains of Death.

Bail chargeable but in one Action.

It is enacted by the 6th *Ann.* ch. 15. *pars.* That where any Bail shall be given in any Action in the Four Courts, such
Bail

Bail shall not be answerable or charged in any other Action or Suit. *

By Statute 8 *Ann.* ch. 7. *pars.* Where any Prisoner in the Custody of the Marshal of the Four Courts on an Execution; or on mesne Process, or Contempt in not performing any Order or Decree of the said Courts, shall make his Escape, and be re-taken pursuant to the said Statute, it shall be lawful for the Bail for such Person in any of the said Courts, to prosecute out of such Courts where they shall be Bail a Writ to the Sheriff of the County to the Gaol whereof such Prisoner re-taken shall be committed, commanding such Sheriff to detain such Prisoner in Custody in Discharge of his Bail, which Writ, with an Account whether he hath the Prisoner in his Custody, shall be returned at a Day therein mentioned, and the Delivery of such Writ to the Sheriff, or his Deputy shall be

Prisoner's escaping out of the Four Court Marshalsea and re-taken, his Bail may have a Writ to the Sheriff to keep him, and it shall be an effectual Render of such Prisoner.

VOL. I.

F

deem-

* Before this Statute was made; in special Bail in civil Actions, where the Bail is to stand in the Place of the principal, Bail to one Action was to stand Bail to all Actions that he should be charged with when in Court. But as to common Bail the Law is still the same, so that in this Court, upon the Defendant's Appearance the Plaintiff may file as many Declarations against the Defendant as he pleases. For Instance, if an Action of Debt be brought for Rent, and pending this Action another Gale becomes due. So likewise on a Bond for a Sum of Money payable by Instalments. See Lord *Macclesfield's* Cases in Law and Equity, 153. But it would seem proper, that the Defendant or his Attorney should have some Notice of the second Action.

Cap' Quo' Bail Bond, &c.

deemed an effectual Render of such Prisoner in Discharge of the Bail; and in case such Sheriff, or his Officer shall after the Delivery of such Writ suffer the Person to escape, they shall be liable to such Action as the Marshal of the Courts is liable to for permitting any Person to escape who was committed upon Render in Discharge of his Bail.

Where there is a Demand for above 10*l.* Cause of Action must be shewed for special Bail.

It is enacted by 6 *Geo. 1. ch. 6. pars.* That where any Action shall be sued forth out of any Court within any County of a City, or County of a Town, or within any Jurisdiction, or Franchise, for any Sum exceeding ten Pounds in Debt, Detinue, Trover, Trespass, or Case, no Person thereon arrested shall be held to special Bail, unless the Plaintiff, his Agent or Attorney shall before the Officer authorized to hold Court of Pleas where such Action shall be sued forth, on Application to him by such Defendant make appear, by Bill, Note, Specialty, or Affidavit, that such Plaintiff hath good Cause of Action against such Defendant; and no Defendant so arrested shall be held on any Action of Debt to give special Bail for any greater Sum than what shall be made appear to be due as aforesaid, nor on any Action of Detinue, Trespass, Trover, or Case, but where the Plaintiff, his Attorney or Agent shall by Affidavit make appear his Cause of Action, and thereon the Defendant shall

shall not be obliged to give special Bail for more than double the Sum so made appear as aforesaid by Affidavit to be the just Demand of the Plaintiff; and where such Cause of Bail shall not be made appear as aforesaid, the Defendant shall be discharged out of Custody on entering his Appearance to such Action by Attorney.

If not Defendant to be discharged on Appearance by Attorney.

2d. Of the Attachment of Privilege at the Suit of the Judges, Officers, or Attornies of the Court.

ATTACHMENT of Privilege, is, where a Man by Virtue of his Privilege calls another to that Court where-to he himself belongs and in respect whereof he is privileged there to answer some Action.

Attachment of Privilege.

And this Writ is to be directed to the Sheriff of the County in which the Defendant lives, and must be made returnable, and must be Tested and is to be executed in the same Manner with the *Capias Quominus*. And if the Sheriff refuses or delays to return this Writ, or to bring in the Defendant's Body when he has returned a *Cepi Corpus*, you may

The Proceedings the same as on the *Capias Quominus*.

Attachment of Privilege.

proceed to fine him, in the same Manner as is before directed on the Writ of *Capias Quominus*.

It may or may not be marked, but the Sheriff must take 40*l.* Bail.

The *Attachment of Privilege* may, like the *Capias Quominus* be either marked, or not marked; but altho' it be not marked, the Sheriff by Reason of the Plaintiff's Privilege must not take less than 40*l.* Bail.

And is not to discharge Bail Bond on Certificate of Appearance.

And in this Case, the Sheriff is not to discharge the Bail Bond upon the Defendant's producing a Certificate of an Appearance being entered for him by an Attorney of the Court, as he is obliged to do upon a Writ of *Capias Quominus* at the Suit of a Common Person. See Title *Appearance, and Bail*,— and Title *privileged Persons*.

One Attorney may have this Writ against another.

And note, it is said, that one Attorney may have this Writ against another Attorney, either of this Court, or of any other Court; and in this Case, the Attorney who is sued must give Bail as a common Person. *Quia inter pares nulla Potestas, sed Quar.* for this does not seem to agree with the Reason of their Privilege, which is, that the Business of the Court and the Suitors may not be prejudiced by being deprived of their Attendance.

3dly, *Of the Common Law Subpoena, and Process of Contempt.*

THE *Subpœna*, is a Process directed to the Defendant, requiring him personally to be and appear before the Barons of this Court, at a certain Day, and under a certain Pain therein limited, to answer such Matters as shall be objected against him : And the Plaintiff's Name is to be indorsed thereon in this Manner, to wit, *A. B. Prosecutes this Writ in the Common Pleas Office of the Exchequer in Ireland.* And the Fees for signing and sealing the *Subpœna* are the same as for the *Capias Quominus*. And in many Cases it is more convenient and better to proceed in this manner than by arresting the Defendant's Body.

Subpœna what.

1st. Because you may compel the Defendant to appear in a much shorter Time than you can proceed against the Sheriff to oblige him to return his Writ, or to bring in the Defendant's Body.

2dly. If the Defendant be a Person of Credit and Substance, you do not thereby expose or affront him as you do by arresting his Body.

3dly. If the Defendant neglects to appear in due Time, you may on the first

Ne Recipiat.

Subpœna and Process of Contempt.

Attachment enter a *ne Recipiat*, by which the Defendant will be obliged to give Bail before his Appearance will be received if the Plaintiff can shew sufficient Cause of Bail.

4thly. If the Defendant stands out the Process of Contempt to a *Commission of Rebellion*, although the Cause of Action be under ten Pounds, in all Cases he must give Bail as a Punishment for his Contempt of the Court and its Process.

5thly. If the Defendant be an Executor, or Administrator, you are not to arrest him for the Debt of the Testator; for in this Case, upon its appearing to the Court to be the Debt of the Testator, they will not require special Bail, but will order the Defendant to be discharged upon a common Appearance being entered for him by an Attorney of the Court.

How to be served.

And this Subpœna may be served personally, by delivering a true Copy thereof to the Defendant in Person any where, and at the same Time shewing him the original Writ signed and sealed by the proper Officers of the Court, and signed also by the Attorney; or it may be served, by leaving a true Copy thereof at the Defendant's usual Place of Residence with one of the Family above the

the Age of sixteen Years to be given to the Defendant.

It must be made returnable either on one of the return Days in Term, or at a certain Day in Term; and must be tested in Term: And if it issues in Vacation, it is generally tested the last Day of the preceding Term; and it may be served at any Time before the Return is out; and it is held that the Service of a *Subpœna* on the Return Day, even in the Afternoon is good Service, for it is uncertain how long the Court may sit, besides there is no Fraction in a Day.

The Test and Return of the Subpœna.

When to be served.

The Persons employed in serving Subpœnas should be literate Persons, and capable of reading the Process which they serve, in order to make an Affidavit of the Service thereof, in Case it be required; they should also be of the Age of sixteen Years at least, and this should appear by the Affidavit, as also the Age of the Person served therewith, unless the Service be on the Defendant in Person.

Persons who serve Subpœnas to be literate.

And to be 16 Years of Age at least.

And note, four Defendant's may be put in one Subpœna tho' the Cause of Action against each of them be separate, or different and separate Declarations may be filed.

Four Defendants may be in one Subpœna tho' the Cause of Action be different.

Defendant an
Inmate or Lodger
how the Service
is to be.

If the Person to be served, be only an Inmate or Lodger in a House, the Copy is to be delivered to himself, or to his own Servant, (not the Servant of the House) or to the Wife, or Child of the Defendant as aforesaid, or to the Person to whom the House belongs, or his Wife.

Time to Appear.

And to this Subpœna the Defendant has four Days in Term after the Return thereof to appear exclusive of Sundays and Holidays; (but in this Case no Holiday is allowed except it be a *Dies non Juridicus*) and if in that Time the Defendant neglects to appear, then, upon a proper Affidavit made of the Service of the Subpœna, an Attachment of Contempt may be issued against him.

Attachment on
Affidavit of Service
of Subpœna.

Attachment
may be directed
to any County
if Defendant's
Place of Abode be
not named in the
Affidavit.

If the Defendant's Place of Abode be particularly set forth, or named in the Affidavit of the Service of the Subpœna, then the Attachment must be directed to the Sheriff of the County in which the Defendant lived at the Time he was so served with the Subpœna: but if the Place of Abode be not set forth, or named as aforesaid; or if it be only said that the Service was at the Defendant's Dwelling-House, in either of these Cases, the Plaintiff may direct the Attachment to any County he pleases.

Alias Attachment.

If the Sheriff returns a *Non est inventus* on the first Attachment, and the De-

Defendant still stands out, the Plaintiff may then issue an Alias Attachment; and upon the like Return upon the Alias Attachment, a Pluries Attachment may issue; and after that, a Proclamation of Rebellion; and then a Commission of Rebellion; and after it, an Attachment to the Serjeant at Arms. But note, that there must be a *Non est inventus* returned on each and every of these Writs, and the same must be filed in the Pleas Office of this Court, before any of the subsequent Process is to issue.

Pluries Attachment, Proclamation of Rebellion, Commission of Rebellion, Serjeant at Arms.

The Attachments, Alias, Pluries, and Proclamation of Rebellion are issued of Course without any Rules for them; but the Commission of Rebellion and Attachment to the Serjeant at Arms, must issue upon Rules to be entered of Course in the Office upon Return of the Proclamation and Commission of Rebellion, *Absque Motione*.

18th Jan. 1681.
RULE.

The Commission and Serjeant at Arms must issue upon Rules of Course, the other Process of course without Rules.

There must be eight Days between the Test and Return of the first Attachment exclusive of the Day of the Test and inclusive of the Return Day; but all the succeeding Process issue without any limited Time between the Test and Return; but Care must be taken, that each and every of them be tested on a Day subsequent to the Day on which the next preceding Process was returnable. And all these Process of Contempt

How the several Process are to be tested and made returnable.

Subpœna and Proceſs of Contempt.

tempt, muſt be made returnable on ſome one of the Return Days in Term, and muſt be teſted in Term,

14th. Nov. 1670.

RULE.

Appearance to be received on Payment of Coſt of Proceſs if Cauſe of Bail be not ſhewn on a *Ne Recipiatur*.

Ordered, that henceforth the Defendant's Appearance in all Cauſes upon Attachments of Contempt be entered and accepted in the Pleas Office unleſs Cauſe of Bail appear to the Court by *Ne Recipiatur*, the Defendant paying the Coſts of ſuch Proceſs of Contempt to the Plaintiff, or his Attorney.

Ne Recipiatur when to be entered and what.

When the Plaintiff has entered the firſt Attachment, he may thereupon immediately enter a *Ne Recipiatur*, which is a Notice or Caution to the Officer of the Court, not to receive the Defendant's Appearance unleſs he gives good Bail; and it is to be entered in the Book of Appearances.

The Proceedings on entering a *Ne Recipiatur*.

But notwithstanding that a *Ne Recipiatur* be entered, yet the Office will receive an Appearance without Bail; becauſe, in this Caſe, the Defendant has a Right to put a Rule upon the Plaintiff to ſhew his Cauſe of Bail, which Rule the Defendant cannot regularly move until his Appearance be entered by an Attorney of the Court; and if the Plaintiff neglects to ſhew Cauſe of Bail within the Time preſcribed by the Rule, or ſhews not ſufficient Cauſe, or that the Cauſe of Action appears to be under 10l. the Court, upon Motion of the Defendant's

'Tho' a *Ne Recipiatur* be entered Defendant is not obliged to give Bail if the Cauſe of Action be under 10l.

dant's Attorney, will order that the Defendant's Appearance shall stand ; (But in the first Case there must be an Affidavit made that the Plaintiff has been served with the Rule) and when the Court has made such Order, the Defendant must forthwith pay the Costs of the Contempts, and also of the *Ne Recipiatur*, or the Plaintiff may go on with the Contempts notwithstanding the Appearance.

Plaintiff to be served with the Rule to shew Cause of Bail.

The Plaintiff has generally but two Days given him to shew Cause of Bail from the Day of his being served with an attested Copy of the Rule ; but upon Motion, the Court will grant him further Time, but upon this Condition, that he shall not in the mean Time go on with Contempts against the Defendant.

Time to shew Cause of Bail enlarged on Stay of Process.

If the Plaintiff shews sufficient Cause of Bail, the Defendant must forthwith give Bail, and must also pay the Costs of the Process of Contempt and of entering the *Ne Recipiatur*, or the Plaintiff may proceed on his Process of Contempt notwithstanding the Defendant's Appearance as aforesaid.

If the Plaintiff shews sufficient Cause of Bail, Defendant to pay Costs of Contempts and of the *Ne Recipiatur*.

But note, the Plaintiff's Attorney must be careful not to receive the Costs of the Attachment, and *Ne Recipiatur* until Bail is given ; for, if the Defendant should afterwards neglect to give Bail, the Plaintiff could not in that Case go on with the Process of Contempt.

But Plaintiff's Attorney not to receive the Costs till Bail is given.

But

76 *Subpœna and Process of Contempt.*

If a Commission of Rebellion be entered Defendant is to give Bail tho' the Debt be under 10l.

But if a Defendant stands out, the Process of Contempt to a Commission of Rebellion, and a *Ne Recipiat* be entered, it is discretionary in the Plaintiff to hold him to Bail, altho' the Cause of Action be under 10l. unless he be sued as Heir, Executor, or Administrator, for in such Case, the Court will accept of his Appearance upon Payment of the Cost of the Process of Contempt: but if the Plaintiff's Demand be for Rent accrued due since the Death of the Testator, or Intestate, in that Case, an Executor, or Administrator shall be held to Bail.

4th Jan. 1697.
R U L E.
Process of Contempt to be made returnable in eight Days after the Return of the former Process.

Ordered by the Court, that for the future all Process of Contempt grounded upon the Service of Subpœnas issued out of the Pleas Office of this Court, may be made returnable within eight Days after the Return of each former Process.

Process set aside for Irregularity.

In running out the Process of Contempt, the Plaintiff must be very careful of proceeding regularly; for if one of the Process has issued irregularly, not only that Process, but also all the subsequent Process shall be set aside.

Rule for Reference to the Officer.

If the Defendant apprehends that any one of the Process has issued irregularly, when he has appeared, his Attorney may move the Court for a Rule to have the

the same referred to the Officer, which the Court will grant; and thereupon, the Officer issues a Summons, by which he appoints all Persons concerned to meet him at the Pleas Office of this Court at a certain Day to be named in the Summons, then, and there, to proceed upon the Reference in a certain Cause depending in the Court between *A. B.* Plaintiff and *C. D.* Defendant, as by Order he is directed. And for this Summons the Defendant is to pay 2s. 6d.

Summons.

And this Summons or a Copy thereof is to be served on the Plaintiff, or his Attorney; and if the Attornies on both Sides attend, then the Officer proceeds to examine the Process of Contempt; and if the Officer reports that such Processes have issued regularly, then the Defendant is to pay not only the Costs of the same, but also the Costs of such Reference and Report, to be taxed by the Officer. And the Officer's Fee for the Report is 6s. 8d.

Summons to be served.

If the Process reported regular, Defendant to pay Costs.

If the Officer shall Report that all the Processes of Contempt have issued irregularly, then the whole Set of Processes shall be set aside; and if some of the Processes have issued regularly, and the rest irregularly, and that the same be so reported, in such Case, only such of the Processes shall be set aside as have issued irregularly, and the rest shall stand; but in either Case

Process irregularly issued.

Subpæna and Process of Contempt.

Case, the Plaintiff shall pay the Defendant the Costs of the Reference and Report, to be taxed by the Officer.

After three Summons's the Officer may proceed *ex parte*.

If the Plaintiff does not attend upon the first Summons, the Defendant's Attorney may then take out a second Summons, which being served, if the Plaintiff does not attend and also pay the Costs of the former Summons, and Attendance, the Defendant's Attorney may take out a third Summons upon which, when served, if the Plaintiff's Attorney still neglects to attend and pay Costs as aforesaid, the Officer may forthwith proceed *ex parte* and make his Report.

Rule of Reference discharged.

When the Defendant has obtained a Rule for referring the Process of Contempt to the Officer, the Plaintiff may forthwith put a Rule upon him to prosecute such Reference in a Week, or in four Days, or that the Defendant's Rule of Reference may be discharged; and if the Defendant doth not in that Time take out a Summons, and serve the Plaintiff therewith, the Court upon Motion of the Plaintiff's Attorney, and upon producing an attested Copy of the last Rule obtained by the Plaintiff for discharging the Defendant's Rule for Reference will make the said last Rule absolute, and will give the Plaintiff his Costs.

If

If the Defendant ſhould take out a Ibidem.
Summons and ſerve the Plaintiff there-
with in due Time, but doth not attend
the Officer upon the Day appointed there-
in to proceed on the Reference, the Plain-
tiff, upon a Certificate from the Officer
of his Attendance, and of the Defen-
dant's non Attendance, may move the
Court to have the Rule of Reference diſ-
charged, which the Court will grant
without further Motion; and alſo the
Coſts of the Attendance, Certificate,
Motion and Rule.

When the Officer has examined the Report, and how
Proceſs of Contempt, he then draws confirmed.
up his Report and gives the ſame to the
Party in whoſe Favour it is made, who
may thereupon move by his Attorney
without Notice, or without ſerving a Co-
py of the Report on the oppoſite Party,
to have the ſame confirmed, and the
Court will thereupon grant a Rule for
confirming the Report abſolutely without
further Motion.

But if the Party againſt whom the Cauſe may be
Report is made ſhall think himſelf ſhewn againſt
aggrieved thereby, he may by his Coun- confirming the
cil ſhew his Objections to the Court, and Report.
move to ſet aſide the Report, and upon
ſuch Motion, the Court will either con-
firm or ſet aſide the ſame as they ſee
Reason; but proper Notice muſt be giv-
en of this Motion to the oppoſite Party.
See

Subpœna and Process of Contempt.

See the Case, the Administratrix of *Ball*, against Administratrix of *Gorges*, *Michaels Term*, 1744.*

A Plaintiff may proceed in his Process of Contempt notwithstanding a Reference for Irregularity.

The Plaintiff may proceed in his Process of Contempt notwithstanding they are referred for Irregularity, as the whole Process is to abide the Event of the Reference; for, if the Process were to be stayed by the Motion for a Reference, it would encourage Delays in the Proceedings of Justice.

The County changed in Process of Contempt.

When some of the Process of Contempt have issued, if the Plaintiff is inclined to change the County, the Court (upon Motion of the Plaintiff's Attorney) will give him Liberty to direct the subsequent Process to any other County.

The

* It is submitted, if this Practice in confirming the Officer's Report should not be altered, and the Party against whom the Report is made, to be either served with a Copy of the Report before it is moved upon, or to have regular Notice of the Motion, or else the Report not to be absolutely confirmed upon one Motion only, but some reasonable Time to be given by the Court to the Party against whom the Report is made to shew Cause why the same should not be confirmed; then upon, a second Motion and no Cause shewn, the Report to be absolutely confirmed.

The Office Fees for the several Process of Contempt, and also the Sheriff's Fees for returning the same.

l. s. d.

For the first Attachment for making out and signing it, and filing the Affidavit	}	0 2 6
Sealing the same		0 0 6
To the Sheriff for returning the same	}	0 1 0
<i>Alias Attachment</i> for making out and signing	}	0 2 0
To the Seal		0 0 6
For the Return thereof		0 1 0
<i>Pluries Attachment</i> for making it out and signing it	}	0 2 0
For the Seal		0 0 6
For the Return		0 1 0
Proclamation of Rebellion, for making out and signing it	}	0 2 0
To the Seal		0 0 6
For the Return thereof		0 3 4
For making out and signing the Commission of Rebellion, and for the Rule	}	0 5 6
To the Seal		0 1 0
For returning the Commission, in which there are generally 4 Commissioners at 1s. each	}	0 4 0
For making out and signing the Serjeant at Arms, and for the Rule	}	0 3 6
To the Seal		0 0 6

Persons serving the Process of the Court abused, or it's Authority contemned.

IF any Person employed to serve or execute any of the Process of the Court, shall be beaten or abused, or any way opposed or obstructed in the Service or Execution thereof, or if contemptuous Words be then spoken of the Authority, Justice, or Dignity of the Court, it is deemed a very great Contempt, and in such Cases, upon an Affidavit made of the several Circumstances and filed with the Clerk of the Pleas Office of this Court, and on Motion thereon by Counsel, (which Motion may be made without Notice) the Court will order an Attachment to issue to the Pursuivant against such Persons as appear to have been guilty of the Contempt, and if the Pursuivant neglects or refuses to return the Attachment in proper Time or makes a false Return thereon, you may proceed against him in like manner as against the Sheriff in such Cases.

Attachment to the Pursuivant.

Motion may be made by the Party charged with a Contempt, that Interrogatories may be exhibited against him in a short Day.

If the Defendant or any of the Persons charged with the Contempt be taken into Custody upon such Attachment, he may by his Attorney move the Court upon an attested Copy of the Rule for an Attachment, and upon a Certificate from the Pursuivant that the Party is in Custody, that the Plaintiff may exhibit Interrogatories against him in a short Day, whereupon the Court will make a Rule that the Plaintiff do exhibit them in four Days, or such other Time as the Court

Court shall think proper, or that the Party so taken into Custody may be discharged, which Rule is to be served on the Plaintiff's Attorney, and if the Interrogatories be not filed in such Time as the Court shall appoint, upon Certificate thereof, and upon Affidavit of the Service of the Rule, and upon Attorney's Motion thereon, the Party in Custody shall be discharged with Costs.

The Interrogatories when prepared are to be ingrossed on Parchment, and to be signed by Counsel and Attorney, and to be lodged with the Chief Baron's Clerk; and then the Court, upon Motion of the Plaintiff's Attorney, will put a Rule upon the Party in Contempt to answer the Interrogatories in a short Day; and he is to be served with a Copy of this Rule, and is to attend the Chief Baron's Clerk, who will get him sworn before one of the Barons, and will then examine him, and take down his Answers to the Interrogatories; and when he has finished the Examination he gives out Copies of the Interrogatories and Answers to the Parties of course, and with out any Order for that Purpose.

Interrogatories
and the Examiner.

Then the Court upon Motion of Counsel for either of the Parties upon the Examiner's Certificate that the Defendant has answered the Interrogatories, will order that the Cause be set down to be heard upon the Interrogatories and An-

Hearing upon the
Interrogatories
and Answer.

swers, on one of the Days in the Term appointed for hearing Law Arguments, and the Rule for that Purpose is to be served on the opposite Party, and the Cause is to be set down by the Clerk of the Pleas in his Paper, and to be heard by the Court; and if it appears to the Court that the Party is guilty of the Contempt he will be continued in Custody, at the Discretion of the Court; but if he be not guilty of the Contempt, the Court will Discharge him with, or without Cost according to the Circumstances of the Case.

The Contempt
may be proved
by Witnesses *Viva Voce*.

But altho' the Contempt should be denied, yet if the Party complaining can prove it by Witnesses, the Court upon Motion of his Counsel will give him Liberty to do so, and will make an Order for that Purpose and for the Witnesses to attend to be examined, and they are to be examined in Court *Viva Voce*, for there is not any Commission in the Law Side of the Court for the Examination of Witnesses. But note, This Rule is seldom granted but at peril of Costs; and it is said that in some Cases the Court have obliged the Prosecutor to give Security for the Payment of the Costs, in Case the Contempt should not be proved, and especially where the Person complained of has denied it fully in his Answer to the Interrogatories.

If

If the Answers to the Interrogatories should not be full, and that the Counsel for the Party complained of, Excepts thereto from the Bar of the Court, (which is the Method of Excepting in this Case,) yet it is said that the Party complained of shall not therefore be kept in Custody unless the Examiner shall certify that he required the Answer of the Party to the Point excepted to, and that he refused or avoided answering it, but if this Certificate does not appear, the Court will consider the Shortness of the Answer as the Fault of the Examiner and not of the Party complained of for the Contempt, for he is unacquainted with the Matters he is to answer to until he comes before the Examiner where he is to answer *Ore Tenus* unassisted either by Counsel or Attorney. And this is the Reason that if the Answer be short, the Counsel shall not except thereto but at the Bar of the Court, and there he shall point out to the Court in what Particulars the Interrogatories are unanswered, and the Court, if they be material may send back the Party to the Examiner to be re-examined there-to. See the Case of *Kelly* against *Stewart*, *Trin.* 1753.

How to proceed if the Answer to the Interrogatories be short.

Letter Missive and Subpæna.

A Letter Missive, is an Epistle directed from the Court to the Defendant, being a Peer, &c. or a Privy Counsellor, requiring him to retain an Attorney of

Letters Missive, what and against whom.

Letter Missive and Subpœna.

the Court to appear for him at a certain Day therein to be limited; and it is made returnable either on one of the Return Days in Term, or at a Day certain in Term, and it is to be dated in Term, and to be signed by two of the Barons at least, of which the Chief Baron (if he be in Town) is to be one.

The original Letter is to be delivered not a Copy.

And note, the Letter Missive itself is to be delivered to the Peer, but it will be proper to keep a Copy thereof in order to draw the Affidavit thereon of the Service of the Original.

If no Appearance in four Days after Return, Subpœna to issue on Affidavit of Service thereof.

And if an Appearance be not entered in four Days after the Return Day in such Letter Missive then, upon an Affidavit of the Service thereof, you may apply to the Officer of the Court, who will thereupon enter a Rule of Course for Liberty for the Plaintiff to issue a Subpœna.

Distingas ad Respondendum against a Peer, and an Attachment against a Privy Counsellor if no Peer.

And the Subpœna is to be tested, and made returnable, and is to be served in such Manner as is before directed in (Page 70) and if the Defendant doth not appear in four Days after the Return thereof the Officer of the Court will at the Instance of the Plaintiff's Attorney and upon his producing an Affidavit of the Service of the Subpœna, enter a Rule of course for a *Distingas ad Respondendum* against a Peer, and an

an Attachment against a Privy Counsellor if he be not a Peer.

It is enacted by 1 Geo. 2. ch. 8. That Distress infinite. Peers of the Realm during the Intervals of Privilege of Parliament, or at any Time after fourteen Days next following any Dissolution or Prorogation, until fourteen Days immediately before the Meeting, or re-assembling of any Parliament, may be proceeded against by Summons and Distress infinite, until common Appearance be entered, or common Bail filed, according to the Course of the Court.

And this Method of Proceeding by Summons and Distress infinite, is to be observed in proceeding against Corporations, or Bodies politick either sole or aggregate; for no Attachment lies against them. *Raym.* 152. 1 *Bacon.* 507. But on such Process of *Distringas*, the Court will order the Sheriff to Return good Issues. 1 *Salk.* 191. Corporations to be proceeded against by Summons and Distress infinite.

It is before set forth in (Page 15) what Persons are intitled to be served with Letters missive, and also how Persons who once were intitled, may by their own Act forfeit their Right to this Distinction of Dignity.

Ordered by the Court, that the Officer of the Pleas Office of this Court RULE. 23d Jan. 1681. do enter Rules of course for all Subpœnas on Letters missive on Affidavits against

Declaration.

gainst Peers or Privy Counsellors to issue
absque motione.

RULE.
23d Jan. 1681.

Ordered, that the Officer of the Pleas Office of this Court, do enter all Rules of course for all Writs of *Distringas ad Respondendum* after Service of Letter misfivive and Subpoena, upon filing of Affidavits against Peers; and for Attachments against others, not being Peers, to issue *absque motione.*

No Attachment
against a Person
who was a Peer-
ess, but lost her
Privilege by
marrying a Com-
moner, but by
Leave of the
Court,

But note, if a Person who was a Peeress by Marriage, but hath lost her Privilege by marrying a Commoner, shall be served with Process as a common Person, and shall neglect or refuse to appear thereto in proper Time, and in such Manner as she is intitled in the Process, the Plaintiff shall not enter an Attachment against her without Leave of the Court, upon a special Motion for that Purpose. See the Case of *Gash* against *Catherine Pierce* commonly called Countess of *Barrymore* in the Equity Side of this Court. 22d June 1730.

Declaration.

The Time Plain-
tiff has to declare.

Further Time
granted on Mo-
tion.

IF the Defendant appears upon a Subpoena, or upon a Capias Quominus not marked, or gives Bail *de adjudicatis solvendis*, (as the Case is) the Plaintiff has four sitting Days in Term of course to declare, exclusive of the Day of Appearance, or Bail; but the Court upon Motion of the Plaintiff's Attorney, and on Cause shewn will in their Discretion grant fur-

further Time to declare, unless the Defendant be in Custody, in which Case, it is seldom granted but upon good Cause shewn,

The Plaintiff may in the same Term in which the Appearance is entered, or in the Vacation after, (as the Declaration is received of Record as of the last Day of the preceding Term, tho' it be filed in the Vacation) file as many Declarations as he pleases against the Defendant in different Actions upon the same Appearance; but where special Bail *de adjucatis solvendis* is entered, there the Plaintiff can only declare in that one Action.

Plaintiff may in the Term of the Appearance, or in the Vacation after, file several Declarations in different Actions on the same Appearance, but not on the same Bail Piece.

But the Plaintiff is not obliged to file his Declaration in the Term in which the Appearance or special Bail is entered, unless the Defendant puts a Rule on the Plaintiff for that Purpose: if such Rule be not put on him, the Plaintiff may file his Declaration any Time within a Year and a Day after Appearance, and afterwards, by moving a Rule* of Course for

If a Rule be not put on the Plaintiff to declare, he may declare at any Time within a Year and a Day after Appearance, and afterwards on Motion for that Purpose.

* So that by obtaining this Rule, which is granted of course, the Plaintiff may file his Declaration in any Number of Years, and may get a Judgment by Surprise, when perhaps, the Defendant has changed his Attorney, or perhaps, he is dead, or the Debt is satisfied, &c. I see no Reason why there should not be a Rule obtained for Liberty to proceed giving a Term's Notice, as in other Cases where the Cause has slept above a Year, (for by the Appearance there was a Cause in Court,) or else this Order for Liberty to declare should be served.

Declaration.

for Liberty to file the Declaration, and suggesting that the Appearance or Bail has been entered above a Year.

Where two Defendants appear by different Attornies.

If two Defendants appear by separate Attornies, if it be in the same Term, you may declare on their separate Appearances; but if it be not in the same Term, you must move the Court for them to join in Appearance, or for Liberty to file your Declaration on their separate Appearances as if they had been of the same Term.

Four Defendants may be in one Subpœna, tho' the Cause of Action against each of them be different, and Plaintiff may declare against each of them separately.

And four Defendants may be in one Subpœna, though the Cause of Action against each of them be separate or different; and in case two of them should join in Appearance, you may yet declare against each of them as if they had appeared separately.

Where Cause of Action is joint and but one Defendant appears.

And where the Cause of Action is joint, and but one Defendant appears, Motion must be made by the Plaintiff for Time to declare till the other Defendant appears.

Declaration what; to contain Certainty and Verity.

A Count or Declaration (which antiently and yet is called *Narratio*) is an Instrument in Writing, containing the Complaint of the Party, and ought to contain two Things (to wit) Certainty and Verity, for that it is the Foundation of the Suit whereunto the adverse Party must answer, and whereupon the Court is

is to give its Judgment; *Certa debet Esse Intentio et Narratio et certum fundamentum et Certa res quæ deducitur in Judicium.* 1 *Inst.* 303.

But it must be understood that there be three Kinds of Certainties; first, to a common Intent, and that is sufficient in Bar, which is to defend the Party and excuse him; secondly, a certain Intent in general, as in Counts, Replications, and other Pleadings of the Plaintiff, that is, to convince the Defendant; and so in Indictments, &c. thirdly, a certain Intent in every Particular, as in Estoppels. 1 *Inst.* 17. 303.

Three Kinds of Certainties.

In drawing a Declaration, there are six Things requisite to be considered; 1st. the Person complaining; 2d. the Person against whom the Complaint is made; 3dly. the Cause or Matter of the Complaint; 4thly. how, and in what Manner the Action did arise; 5thly. the Time and Place the Injury was done; 6thly. the Damages thereby sustained.

In drawing a Declaration, six Things to be considered.

Persons attainted of Treason or Felony, outlawed, or excommunicated Persons, or Persons convicted of *Premunire*, *Popish* Recusants, Aliens born out of the King's Allegiance, Persons entered and professed in Religion, &c. cannot maintain a Declaration while such Impediments remain; but all Persons who are not

What Persons may maintain Declarations.

Declaration.

not disabled as aforesaid, whether Men or Women, Idiots, Lunaticks, Deaf, or Dumb, &c. may bring Actions, and maintain Declarations.

Infant.

An Infant is to sue either by his Guardian, or next Friend; but always defend by Guardian. 1 *Inst.* 135.

Idiots.

Idiots cannot appear by Attorney, but when they sue or defend any Action they must appear in Person, and the Suit is to be in their Names, and followed by others. 2. *Sed.* 112. 335.

Lunaticks.

If a Lunatick sues an Action, it must be sued in his own Name; and if an Action be brought against a Lunatick, he is to appear by Attorney if of full Age, and by a Guardian if under Age. 1 *Inst.* 135.

Executors.

When an Action is brought by Executors, it is to be in the Name of all of them, though some do not take upon them the Executorship; but in Actions against Executors, such only as administer are to be sued. 1 *Rol.* 924. See *Jacob's Law Dictionary* (Title *Executor*.)

Baron and Feme.

In all Cases where the Feme shall not have the Thing recovered but the Husband only, he alone is to bring the Action. 1 *Rol. Rep.* 360.

But

But in those Cases where the Debt or Cause of Action will survive to the Wife, the Husband and Wife are regularly to join in the Action, as in recovering Debts due to the Wife before Marriage, in Actions relating to her Freehold or Inheritance, or Injuries done to the Person of the Wife. 1 *Rol. Abr.* 347. *Moor* 432. Ibidem.

A *Feme Covert* can in no Case sue without her Husband, unless he has abused the Realm, or is banished whereby he is *Civiliter Mortuus*. *Co. Lit.* 133. a. 1 *Rol. Rep.* 400. *Sed. Quaer.* if in this Case, she must not sue by her next Friend. Feme Covert.

When Husband and Wife join in any Action, Damage is to be laid only to the Husband. Baron and Feme.

The Husband is by Law answerable for all Actions for which his Wife stood attached at the Time of the Coverture; and also for all her Torts and Trespasses during Coverture, in which Cases the Action must be joint against them both; for if she alone were sued, it might be a Means of making the Husband's Property liable without giving him an Opportunity of defending himself. See 1 *Bac. Abr.* 307. Baron and Feme.

If the Plaintiff doth not file his Declaration within the Time appointed for his declaring, the Defendant may then take Non-Pros.

Declaration.

take out a Certificate of no Declaration being filed, (in which Certificate the Day of the Defendant's Appearance is to be expressed) and may thereupon move the Court by his Attorney, for a *Non Pros*; and on such Motion, the Court will grant a Rule for the same, unless the Plaintiff declares in four Days after; and the Defendant is not obliged to serve the Plaintiff with this Rule; and if the Plaintiff doth not file his Declaration in these four last Days, the *Non Pros* will issue of course.

Costs of the Rule for the *Non Pros* to be paid before Plaintiff files his Declaration or the Rules to plead may be stopped.

If the Plaintiff should file his Declaration without paying the Costs of the Certificate of no Declaration, and of the Motion and Rule for the *Non Pros* the Defendant's Attorney may move the Court that the Rules to plead may be stopped until the said Costs be paid, which the Court will grant.

Judgment obtained on a Declaration after a *Non pros*, and Costs not paid to be set aside.

If after the Defendant has obtained a *Non Pros* the Plaintiff shall file his Declaration without paying the Defendant the Costs of the *Non Pros* and shall run out the Rules to plead, and obtain Judgment thereon for want of a Plea, the Court upon Counsel's Motion will set aside such Judgment, and oblige the Plaintiff to pay the Cost of the *Non Pros* and also the Cost of the Motion; and will order the Rules to plead to be entered *de novo*, or give the Defendant a reasonable Time to plead; and

and if Execution has been executed, the Court will set aside the Judgment, and order Restitution to the Defendant; for the Court look upon such a Judgment as irregular, and obtained by Surprise.

If Execution be executed the Court will order Restitution.

Where a Judgment is set aside after Execution for any Irregularity, there needs no *Scire facias* for Restitution, but an Attachment of Contempt if, upon the Rule for Restitution, the Money be not restored. 2 Salk. 588.

On an irregular Execution no *Scire facias* for Restitution to issue but an Attachment.

If the Plaintiff be not taken on a *Non Pros* before the Return thereof is out, the Defendant before he renews the *Non Pros*, ought to move a Rule by his Attorney for Liberty to renew the *Non Pros*, and add the Post Costs otherwise the Officer will not add the Post Costs for the Rule and new Writ.

Motion to be made for renewing of a *non Pros*, if the Return be out, and for adding the Post Costs.

When the Declaration is drawn, it is to be ingrossed on Parchment, and to be signed by Attorney in all Cases; and it is also to be signed by Counsel (except it be for Debt by Bond, or penal Bill) and is to be filed with the Clerk of the Pleas Office of this Court.

Declaration how to be prepared for filing.

When the Declaration is filed, the Officer thereupon enters the three first Rules to plead of course; in each of which Rules, there are four Days exclusive; and they are thus *to wit*, four Days to plead; four Days by the Favour of the Court to plead; and four Days

Rules to plead.

Declaration,

Certificate of no
Plea, and Motion
for Judgment.

Days by the great Favour of the Court to plead; and if the Defendant doth not plead in that Time, the Plaintiff's Attorney may then take out a Copy of the last Rule, and a Certificate of no Plea being filed, and thereupon may move the Court for Judgment, which the Court will grant, unless a Plea be filed in four running Days after such Rule Sundays and *Dies non* excepted: And if the Defendant doth not plead in these four last Days, the Judgment is absolute without further Motion.

Defendant may
plead in the four
last Days with-
out then paying
Costs.

And note, if the Defendant should plead in these four last Days, he is not to pay any Costs, for in this Case the Costs are to abide the Event of this Suit.

Six Days only to
plead on *Habeas
Corpus cum causa,
Habeas Corpus su-
per cepi, Distrin-
gas Nuper Vic.*
and Proclamation
of Rebellion.

On all Writs of *Habeas Corpus cum causa, Habeas Corpus super cepi, Distringas, Nuper Vic. Proclamation of Rebellion*, and all secondary Process, the Defendant shall have but six Days to plead; but in any of these Cases, the Plaintiff's Attorney must mark at the Foot of the Declaration that such Writ has issued, or the Officer will not take Notice of it, but will enter the Rules in the common Way. This Rule was made to prevent the Delays occasioned to Plaintiffs, by Defendants not entering their Appearances or Bails in proper Time to Writs or Process. See the Rule Page 99.

29th Jan. 1695.
R U L E.

The

The ordinary Rules for pleading to all Declarations and Writs of *Scire facias* *Post. Ann. & Diem*, except the Rule for Judgment are entered of course in the Office.

Rules to plead.

If a Plaintiff doth not proceed upon his Declaration within a Year and a Day after the last Rule, he must in such Case obtain a Rule for Liberty to proceed giving a Term's Notice, or his after Proceedings will be deemed irregular: And note, that this Rule may be moved on the *Esso'ine* Day of the Term, and if it be served on the Defendant before the sitting Day, it is a sufficient Notice within the Rule and the Plaintiff may proceed in the following Term of course.

If no Proceedings above a Year, a Motion is to be made for Liberty to proceed.

R U L E.

If the Plaintiff will discontinue his Suit, he must first obtain a Rule for that Purpose, and must pay the Defendant Costs thereon to be taxed by the Officer.

Discontinuance.

The Plaintiff may upon Motion to the Court obtain Leave to amend his Declaration at any Time before the Defendant has pleaded or demurred without Costs, and also without Prejudice to the Rules to plead.

Declaration amended and the Proceedings thereon, and when Cost is, and when it is not to be paid.

But if the Defendant has pleaded or demurred, the Plaintiff must then pay the Costs of such Plea or Demurrer; and the Rules to plead in this Case, are to be

Ibidem.

Declaration.

entered *de Novo*. But note, that in Declarations and Pleadings no Amendment is to change the Action, or alter the Nature of the Issue.

Ibidem.

And in all Cases where the Plaintiff amends his Declaration after the Defendant has taken out a Copy thereof, he is either to serve the Defendant with a Notice to bring in his Copy in order to have the same amended, or else he is to serve the Defendant with an attested Copy of the amended Declaration.

How to declare
on simple Con-
tracts.

A Declaration on a simple Contract, or Agreement to pay Money for Goods sold and delivered, may be either in Debt, or Case, at the Option of the Plaintiff; if you declare in Debt, you must not say, *Promise to pay, but agreed to pay.*

The old Way was to lay it in Debt, but then the Defendant could wage his Law, and if he swore in the Presence of his Compurgators (who were to swear with him) that he owed nothing, the Plaintiff was barred for ever; therefore to avoid this, Plaintiffs do now generally declare in Case. See *Slade's Case* 4 Co. 92 to 94. Where it is said on a *Quominus* in the Exchequer, that a Defendant cannot wage his Law in that Court, because the Plaintiff surmises that he is the King's Debtor.

Where-

Whereas several Delays have happened in the Cases of Writs of *Habeas Corpus super cepi*, *Distingas Nuper Vic. Proclamation of Rebellion*, and *Habeas Corpus cum causa* for the Removing of Actions from inferior Courts into the Pleas Office of this Court, for that the several Defendants in such Writs or Processes entering their Appearances or Bails, have had the usual Time to plead to Declarations filed against them upon such Appearances or Bails as any other Person hath had, who hath entered his Appearance or Bail upon the first Process issued against them: It is therefore Ordered, for the Prevention of such Delays for the future, that the Defendant on such Process of *Habeas Corpus*, &c. shall enter their Appearances or Bails as of the precedent Term, that they come in to enter such their Appearances or Bails, unless where the Cause of Action returned with the said Writ of *Habeas Corpus cum causa* appears to have arisen afterwards; and that they shall within six Days after the Plaintiff's filing his Declaration upon such Appearances or Bails plead thereto, or Judgment to be entered for the Plaintiff against such Defendant by *Nil dicit*.

29th Jan. 1695.

RULE.

Only six Days to plead on *Habeas Corpus*, &c. and all secondary Process.

Where a Declaration is filed upon a leading Order where an Issue is directed from the Equity Side of this Court to be tried at Law, it is to be marked at the

No Rules to plead entered on a Declaration upon a leading Order.

Declaration.

Foot thereof, that it is upon a leading Order, for in this Case no Rule to plead is to be entered thereon as the Defendant is to plead to Issue by the Order.

Officer not to receive Declarations on popular Actions or penal Statutes, till Affidavit that Offence was not committed in another County, and within a Year.

By 10 and 11 *Car.* 1. Sess. 4. ch. 11. *pars.* The Officer of the Court shall not receive any Declaration in Actions popular, or upon any penal Statute until the Informer maketh Oath before some of the Judges of that Court that the Offence was not committed in any other County than as laid in the Information, and that he believes in his Conscience, the same was committed within one Year before the Suit was commenced.

Plaintiff may in Actions on Bonds to perform Covenants assign several Breaches, and have Damages for such as are proved.

By 9th *Will.* 3. Sess. 1. ch. 35. In all Actions to be commenced and prosecuted in any of the King's Courts of Record in this Kingdom upon any Bond or penal Sum for non Performance of the Covenants in any Indenture, or Deed of Writing, the Plaintiff may assign as many Breaches as he shall think fit; and the Jury upon the Trial shall not only assess such Damages and Costs as have been heretofore done in such Cases, but shall also give Damage for such of the said Breaches so to be assigned, as the Plaintiff upon the Trial of the Issues taken therein shall prove to have been broken, and like Judgment to be entered on every such Verdict, as has heretofore been done in such Cases.

And

And if the Defendant plead not to Issue, but Judgment shall be given against him upon Demurrer, or by *Nil dicit*, or *Non sum informatus*, *Cognovit Actionem*, or the like, then the Plaintiff may suggest upon the Roll, as many Breaches as he shall think fit; and then a Writ shall issue to the Sheriff of the County where such Action shall be brought, to summon a Jury to appear before the Justice or Justices of Assize, or *Nisi Prius* at their coming thither, to inquire of the Truth of every one of those Breaches, and to assess the Damages severally: And the said Justice or Justices shall make Return thereof to the Court, from whence the same shall issue; which Writs so returned, shall be filed, and then Judgment shall be entered as in Cases of Writs of Inquiry of Damages.

And how Damages may be assessed on Judgment by Demurrer, or by Default.

And if the Defendant after such Judgment entered and before Execution executed, pay into the Court the Damages and Costs of Suit, then a Stay of Execution shall be entered upon the Record thereof, and made accordingly for that Time; and when by Execution sued forth and executed upon such Judgment, the Plaintiff, his Executors, or Administrators, shall be satisfied the Debt and Damages, or the Penalty of such Bond or Bill Penal, at the Election of the Defendant, with Cost of Suit and

Execution to be stayed on paying the Damages, and if executed and Debt &c. paid, Satisfaction to be acknowledged on the Record.

Declaration.

Damages not
full, the Judg-
ment to remain
as a Security for
the Remainder.

Charges for executing the same; then the Body, Goods, and Lands of the Defendant shall be discharged from such Execution, and the same shall be entered upon the Roll of the said Judgment: But if the Damages do not amount to the Penalty of such Bond or Bill Penal, such Judgment shall (notwithstanding such Entry on the Roll as aforesaid) still remain in Force as a further Security to answer such Damages, as may at any Time afterwards be sustained by Reason of any further Breach of Covenants, (if any such happen and no Satisfaction be made) so far as the Remainder of such Penalty will reach, upon which Breach the Plaintiff may sue out a *Scire facias* upon the Judgment against such Defendant, his Executors, or Administrators, or against his Heirs or Ter Tenants, grounded upon Suggestion of other Breach or Breaches as aforesaid, and so like Proceedings to be as afore shewed.

With like Provi-
soes as aforesaid.

Provided that upon Payment of all such future Damages, Costs and Charges; or of so much thereof, as the remaining Sum of the Penalty of such Bond or Bill penal (after Payment of the Damages formerly recovered) will extend unto, together with the Costs of Suit, then all further Proceedings on the said Judgment shall again be stayed: and so *Toties Quoties* as Occasion shall require upon every new Breach, the said Judgment to be

be made use of as far as aforesaid, and no further; and upon Satisfaction as aforesaid, the said Defendant his Body, &c. to be again discharged out of Execution as afore shewed.

By Statute 2 *Ann.* cap. 5. *Sec.* 2. All Wills, Dispositions, or Appointments of Lands or Tenements, or of any Rent, Profit, Term or Charge out of the same, whereof any Persons at the Time of their Decease shall be seized in Fee simple in Possession, Reversion, or Remainder, or have Power to dispose of the same by their last Wills, shall be deemed only as against the Creditors by Bond or Specialty binding the Heir, to be fraudulent and void.

All Wills concerning Lands in Fee Simple, &c. void as to Creditors &c.

And by *Sec.* 3. every such Creditor shall have his Action of Debt upon his Bonds and Specialties, against the Heirs at Law of such Obligors and such Devisees jointly; and such Devisees shall be liable for a false Plea in the same Manner as any Heir should have been, or for not confessing the Lands or Tenements to him descended.

And they may have their Actions against Heirs and Devisees jointly.

But by *Sec.* 4. Where there shall be any Limitation or Disposition of Lands or Tenements for the Raising or Payment of just Debts or Portions for Children, other than the Heir at Law, in pursuance of any Marriage Contract,

Provisions for younger Children before Marriage saved.

Agreement in Writing made before Marriage the same shall be in Force.

Fraudulent Conveyances made by the Heir who is liable, he shall answer the Debt.

And by *Sett. 5.* Where any Heir at Law shall be liable to pay the Debt of his Ancestor in regard of any Lands or Tenements descending to him, and shall alien the same before any Action brought, such Heir at Law shall be answerable for such Debt in an Action of Debt, to the Value of the Land by him aliened; in which Cases all Creditors shall be preferred as in Actions against Executors; and such Execution shall be taken out upon any Judgment obtained against such Heir to the Value of the Land, as if the same were his own Debt, saving that the Lands *bonafide* aliened before the Action brought shall not be liable.

Heir may plead *Riens per descens* to an Action upon a Specialty.

And by *Sett. 6.* Where any Action of Debt upon Specialty is brought against any Heir, he may plead *Riens per descens* at the Time of the original Writ brought, or the Bill filed, and the Plaintiff may reply that he had Lands, Tenements, or Hereditaments from his Ancestor before the original Writ brought, or Bill filed; and if upon Issue joined it be found for the Plaintiff, the Jury shall enquire of the Value of the Lands descended, and thereupon Judgment shall be given and Execution awarded; but if Judgment be given against such Heir by Confession of the Action, without confessing the Assets descended, or upon Demurrer,
or

or *Nibil dicit* it shall be for the Debt and Damages without any Writ to enquire of the Tenements descended.

And by Sect. 7. Every Devisee made liable by this Act, shall be chargeable in the same Manner as the Heir at Law, notwithstanding the Lands devised shall be aliened before Action brought.

Devisees liable
as Heirs.

Declarations against Prisoners.

If the Sheriff brings the Defendant's Body into Court in pursuance of the Return of the Writ, then, if the Defendant cannot give Bail as the Action requires, the Court will immediately commit him to the Marshalsea of the Four Courts, and a Rule is thereupon entered for that Purpose by the Clerk of the Pleas in the Rule Book.

Defendant committed for want
of Bail.

And when the Defendant is so committed, the Plaintiff must declare against him before the End of the next Term after such Process is returnable; and in his Declaration he must alledge, that the Defendant is in Custody of the Marshal of the Marshalsea of the Four Courts; and when the Declaration is filed, he must serve the Defendant with an attested Copy thereof, and also of the first Rule to plead, or the Gaoler or Marshal may be served therewith; and if such Prisoner shall not appear, and plead before the End of the next Term after such Declaration

Declaration against Defendant
in Custody.

The Time given
the Defendant to
plead.

Declaration.

Declaration delivered, the Plaintiff shall have Judgment as if he appeared and refused to answer and plead. *See 8 Ann. ch. 9 Post.*

Defendant charged in Custody by *Habeas Corpus ad Respondendum.*

Where a Person is already imprisoned in the Marshalsea of the Four Courts, or in any other Prison, upon any Process at the Suit of another, and that a third Person would sue the Prisoner in this Court, in such Case, he may sue forth a *Habeas Corpus ad Respondendum* directed to the Marshal, Gaoler, or Keeper of the Prison, or to the Mayor, &c. of the inferior Court; and by this Writ the Marshal, Gaoler, or Keeper of the Prison, or Mayor, &c. of the inferior Court, is required to have the Body of the Prisoner then in his Custody before the Barons of the Exchequer at the Return thereof; and when the Defendant is brought up to the Bar of the Court, he is from thence committed to the Custody of the Marshal of the Four Courts at the Suit of the Plaintiff in that Action; and thereupon a Rule for that Purpose is entered by the Clerk of the Pleas. *Sed. Vide Post. 8 Ann. ch. 9.*

The Duty of an inferior Court on receiving a *Habeas Corpus ad Respondendum.*

And if a Prisoner be imprisoned upon any Process from any inferior Court of Record, and that a Writ of *Habeas Corpus ad Respondendum* is sued forth to have the Body of the Defendant brought before the Barons of this Court to answer the Plaintiff's Action here, in such Case, the

the inferior Court upon the Return of the said Writ, annexes a Schedule thereto, in which are contained all the Causes that are then subsisting and depending therein against such Prisoner; and upon each of these Causes the Defendant is committed by this Court to the Marshal of the Four Courts by Rules which are entered of course in the Rule Book for that Purpose: and of each of these Rules an attested Copy is to be delivered to the Marshal, and shall be a good Cause of Detention of such Prisoner in his Custody, from which he shall not be discharged without a lawful Superfedeas or Rule of Court: and if the Marshal shall do otherwise, he shall be responsible to the Court, and the Party grieved may bring an Action on the Case against him for Damages, for discharging such Prisoner.

If the Mayor, &c. of the inferior Court, or the Marshal of this Court do not return the Writ of *Habeas Corpus ad Respondendum* in Time, you may fine them as you do the Sheriff.

And note, That in either of these two last Cases the Plaintiff is to proceed in declaring against the Defendant in the same Manner as is before directed where the Defendant is first committed upon the Process of this Court; and the Defendant has the same Time to plead thereto.

Proceedings on the Declaration against a Defendant in Custody.

If

Where a Defendant is in Custody, he may move by his Attorney that he may be discharged if Plaintiff doth not declare in 4 Days

If the Defendant be either taken, or charged in Custody, and detained for Want of Sureties for his Appearance, (as aforesaid) he may move the Court by his Attorney that the Plaintiff may declare against him in four Days, or that he may be discharged out of Custody as to that Action, which the Court will grant; and if the Plaintiff doth not file his Declaration in four Days after Service of this Rule, the Court upon Affidavit of the Service thereof, and upon Motion thereon will order the Defendant to be discharged, and his Appearance to be accepted of without further Motion; but the Plaintiff's Attorney may move in these four Days for some further Time to declare, and the Court upon such Motion, and upon good Cause shewn, will grant him some reasonable Time altho' the Defendant be in Custody.

Attachment against a Gaoler for suppressing a Declaration received by him for a Prisoner.

If any Gaoler or Keeper of a Prison having received a Copy of a Declaration against any Prisoner in his Custody, shall suppress the same, and not deliver it forthwith unto such Prisoner, an Attachment on Affidavit of such Delivery shall be issued against him.

A Declaration may be filed against a Defendant in Custody at the Plaintiff's Suit without suing forth a Habeas Corpus to remove him.

Formerly by the common Course of Practice, when the Plaintiff in any Writ issued out of any of the four Courts of Record had been at great Charge to arrest the Defendant upon such Writ, and the

the Defendant for Want of sufficient Bail was committed to Gaol, then unless the Plaintiff did before the End of two Terms next after such Arrest, cause such Defendant by Writ of *Habeas Corpus* to be removed, to be charged in the said respective Courts with a Declaration of the Cause of such Action, such Prisoner was upon a common Bail or Appearance by an Attorney discharged from his Imprisonment to the great Prejudice of the Plaintiff, for the Remedy whereof,

It was enacted by the 8 *Ann.* ch. 9. That if any Defendant be taken or charged in Custody, upon any Writ out of any of the four Courts, and detained for Want of Sureties for his Appearance, the Plaintiff may before the End of the next Term after such Process is returnable, declare against such Prisoner in the Court out of which such Process shall issue, and cause a Copy thereof to be delivered to such Prisoner, or Keeper of Prison; to which, if such Prisoner shall not appear and plead before the End of next Term after such Declaration delivered, the Plaintiff shall have Judgment as if he appeared and refused to answer and plead.

And that in all Declarations against any Prisoner detained by any Process out of the *Queen's-Bench*, it shall be alledged in Custody of what Sheriff, or other Person having the Return and Execution of Writs, such Prisoner shall be at the Time of

How it is to be alledged in the Declaration if the Process be from the *Queen's Bench*.

Declaration.

of such Declaration, which Allegation shall be as effectual as if such Prisoner was in Custody of the Marshal of the Four Courts.

Motion on behalf of the Defendant for Plaintiff to declare against him in Custody of the Sheriff.

In the Case of *Bumbury* against *Healy* in *Michealmas* 1744, the Defendant was arrested and taken into Custody by the Sheriff of the County of *Cork* upon a Writ of *Capias Quominus* issued forth of this Court, and upon Motion of the Defendant's Attorney it was ordered that the Plaintiff should declare against the Defendant in Custody of the Sheriff in four Days after Service of the Rule, or that the Defendant should be discharged out of Custody.

Of laying the Venue in Declarations.

Venue what.

Venue (*Vicinetum* or *Vifnetum*) is taken for a neighbouring Place, *Locus quem Vicini habitant*, it is the Place from whence a Jury are to come for Trial of Causes *F. N. B.* 113.

Venue in transitory Actions may be laid in any County.

All Actions personal, where no Possession is awarded are in their own Nature transitory, and not local; as Debt, Detinue, Assault, Annuity, Account, Deceit, Trover, Actions on the Case, &c. And the *Venue* may be laid in any County, and the Fact alledged to be done in any Place, and the Defendant cannot traverse it, and say it was done in another Place; and yet they ought to be laid

laid and tried in their proper County, and where the Fact was done, unless the Court order the contrary for some special Reasons; and if they are laid out of their proper County, daily Practice tells us the Court may alter the *Venue* upon Affidavit made that the Plaintiff's Cause of Action (if any be) did arise in such a County, and not in the County where he has laid his *Venue*, and that it will be a great Expence to procure his Witnesses; but such Motion must be made before Issue joined, for by joining of Issue, the Defendant agrees with the Plaintiff as to the Manner of bringing his Action: And tho' the Court seldom refuses on such Affidavit, upon Motion thereon, and Notice given, to change the *Venue*, yet if before or after the Motion be made, the Plaintiff will enter into a Rule, to offer no Evidence but what arises in the County where he has laid his Action, the Cause shall be tried there. See *Trials per Pais*, pag. 90.

If the Plaintiff enters into a Rule to offer no Evidence but what arises in the County where the *Venue* is laid, the Cause shall be tried there.

But Questions of Title of Land (except by special Order of the Court in some Cases) are to be tried in the County where the Lands lye, for the Law is, that all real and mixt Actions, as Waste, Ejectment, &c. and Actions of Trespass, Trespass on the Case against Officers of Justice &c. must be brought in the County where the Land is, and where the Cause of Action arose. *Trials per Pais* pag. 90.

Title of Land to be tried where the Land lies.

And Actions of Trespass where the Tort was done.

A Motion

Motion on the
last Day of Term
to change the
Venue too late.

Not to be
changed where
Plaintiff may
lose a Trial.

Venue if to be
changed after the
Defendant has
pleaded.

A *Motion* to change the *Venue*, regularly should not be made upon the last Day of the Term, as the Plaintiff may not have an Opportunity of shewing Cause, and the Court will not change the *Venue* where the Plaintiff may lose a Trial.

In the Case of *Teige* against *Sandford* in this Court, *Trinity-Term* 1751, a Motion was made by the Defendant's Council on the last Day of Term, and after the Defendant had pleaded to Issue to change the *Venue*, but upon solemn Debate the Motion was refused, altho' the Affidavits were full that an impartial Trial could not be had; and that for two Reasons, first, for that the Defendant had pleaded, and had therefore agreed with the Plaintiff as to the Manner of bringing his Action, then, that the Application was a very late one, and the Plaintiff had not an Opportunity to shew Cause against it and would be hindred from a Trial at the next Assizes.

If to be changed
in a local Action.

In the Case of *Vernel* against *Averel* in this Court *Trinity Term* 1748, It was said, that a *Venue* in a local Action cannot be changed but by Consent of the Plaintiff, but if the Plaintiff will not consent, the Court will give the Defendant Leave to imparl until the Plaintiff does consent.

When

Pleadings.

WHEN the Declaration is filed, the Rules to plead are to be entered thereon as is before set forth in (p. 95.) and the Defendant is without Loss of Time to bespeak an attested Copy of the Declaration in order to be prepared to plead to it, for no Plea is to be received unless the Copy of the Declaration be first taken out, and the Rule is the same as to all other Pleadings.

The Defendant is to plead to the Declaration.

No Pleading to be received unless a Copy of the former Pleadings be taken out.

Now, as there is no Branch of the Profession of an Attorney that requires more Skill and Attention than this of Pleading does, I believe it will not be thought amiss, if in treating upon this Head, I am somewhat more particular than ordinary.

Pleadings then, strictly taken, are the Answers which the Defendant gives to the Plaintiff's Charge; and in this Sense are only two kinds, *viz.* *Pleas in Bar*, and *Pleas in Abatement*; but in a large Sense they extend to all the Sayings of the Parties after the Declaration, including both the Pleas aforesaid, and also *Replications*, *Rejoinders*, *Sur-Rejoinders*, *Rebutters*, *Sur-Rebutters*, &c. *Inst. Legal*, 460.

Pleadings what.

Pleas general or special.

General Plea.

And Pleas are either General or Special; General, to the Declaration, as in Debt, or on Contract, *Nil debet per Patriam*; in Debt on Bond, *Non est factum*; in an Action of the Case upon a Promise; *Non assumpsit*, in Trespass, &c. not guilty, in Covenant, *Performance of Covenants*, &c.

Special Plea.

A Special Plea contains the Matter at large, concluding to the Declaration, or Action, as by *Duress*; *per Minas*; and in Justification, as that in Battery, the Plaintiff struck the first Blow, &c. If one hath Cause of Justification and Excuse in Trespass, he must confess the Fact and plead the special Matter, for if he pleads not guilty, he can't give the special Matter in Evidence.

In particular Cases Defendant may plead the general Issue and give the special Matters in Evidence.

But by several late Statutes, in many particular Cases, the Defendant may plead the general Issue, and give the special Matter in Evidence. See *Robin's Abridgement* of the Acts of Parliament. *Title. General Issue.*

Special Pleas of two Sorts.

Special Pleas in Answer to the Plaintiff's Declaration are generally of two Sorts; *Pleas in Bar* and *Pleas in Abatement*.

Plea in Abatement.

A Plea in Abatement is where the Defendant shews Cause to the Court why he should not be impleaded; or if implead.

pleaded, not in the Manner and Form he then is.

And Pleas in Abatement are very various, for Instance, to the Jurisdiction of the Court; to the Person; the Name; the Addition; the Death; Covert Baron; one of the Executors or Administrators not named; Infancy in the Plaintiff, or Defendant, (though Infancy in the Defendant may also be given in Evidence at the Trial and will non Suit the Plaintiff though not pleaded,) other Actions depending; Privilege; *to wit*, that the Defendant is an Attorney of the King's Bench or Common Pleas and ought not to be sued in the Exchequer, and the like. *Inst. Legal.* 460.

Pleas in Abatement various.

And note, many Matters pleadable in Abatement, may be also pleaded in Bar. *Inst. Legal.* 520.

Many Matters pleadable in Abatement may also be pleaded in Bar.

As these Pleas in Abatement enter not into the Merits of the Cause but are dilatory they are little favoured, and the Law has laid the following Restrictions on them.

Pleas in Abatement not favoured in the Law.

1st. By the Statute 6 *Ann.* ch. 10. For the Amendment of the Law, no dilatory Plea is to be received unless the Truth thereof be proved by Affidavit; or some probable Matter be shewn to the

Dilatory Plea not received but upon Oath or probable Matter.

Court to induce them to believe that the Fact of such dilatory Plea is true.

Not received after a *Respondeas Ouster*.

2dly. No Plea in Abatement shall be received after a *Respondeas Ouster*, for then they would be pleaded in *Infinium*.

Not after a general *Impar-*
lance.

3dly. That they shall be pleaded before a general *Impar*lance.

On Issue joined thereon, the Judgment against Defendant is always final.

4thly. When an Issue is joined on them; if it be found against the Defendant it shall be peremptory.

Plea in Abatement after a general *Impar-*
lance over ruled.

If a Plea in Abatement be pleaded after a general *Impar*lance, the Court on Motion will over-rule it and give the Defendant four Days peremptorily to plead to issue, or Judgment for the Plaintiff.

Demurrer to a Plea in Abatement.

And if such Plea in Abatement be received after a general *Impar*lance and the Plaintiff doth demur to it the Demurrer is good; but if the Plaintiff replies, the Defendant's Attorney must be cautious how he rejoins to the Plaintiff's Replication, for in this Case, if it should be found against the Defendant the Judgment is final; the usual Way, is to Demur to the Replication, and then the Judgment can be but a *Respondeas Ouster*, whereupon the Defendant shall plead another Plea. *Inst. Legal*, 464.

How to proceed if Plaintiff replies to such Plea.

Respondeas Ouster.

Also upon over ruling a Plea which is pleaded in Bar of the Action, Judgment shall be given against the Defendant, for such Plea is peremptory. *Inst. Legal.* 464.

Plea in Bar if over-ruled, the Judgment is final.

But after a special *Impar lance*, the Defendant may plead in Abatement; for thereby he saves his Advantage by the Words, *Saving to himself all and all manner of Advantage, &c.*

After a special Impar lance Defendant may plead in Abatement.

When a Defendant pleads in Abatement, he must annex an Affidavit to his Plea of the Truth thereof, or the Plaintiff may sign Judgment. *Michaehmas* 12 *Geo. i Pract. Reg.* 4.

Plea in Abatement without an Affidavit Judgment signed.

But the Affidavit of the Truth of a Plea in Abatement made by the Defendant's Attorney, hath been held sufficient; for thereby probable Cause is shewn, which is all that the Statute requires, *Hill.* 13 *Geo. 2. Pract. Reg.* 6.

Affidavit of Attorney sufficient.

The Plaintiff may confess the Defendant's Plea in Abatement, and enter a *Cassetur breve* on the Roll, without moving the Court for Leave, or paying Costs: So determined in the Case of *Osborne* against *Haddock.* *Michaehmas* 11. *Geo. 2.* And the Plaintiff brought a new Action. See *Pract. Reg.* p. 6. *Sed Quare.*

Plaintiff may confess Defendant's Plea in Abatement and enter a *Cassetur breve* without Leave of the Court, and without paying Costs.

A Plea in Abatement not amendable.

A Plea in Abatement is not amendable, because a Matter in Abatement must be pleaded without an *Impar lance*, and an Amendment is in the Nature of an *Impar lance*. *East. 12. Geo. 1. Pract. Reg. 21.*

For the many and various Kinds of Pleas in Abatement and the Forms thereof, and some special Rules of Law relating thereto. See *Inst legal. 473. to 513. and Inst. Clerical. V. 1 and 3d.*

Plea in Bar.

A Plea in Bar is an Objection to the Plaintiff's Action, shewing some Cause why he ought not to have the same. And this Plea may be pleaded after a general *Impar lance*; and it is either peremptory, or perpetual, which (if adjudged for the Defendant) for ever destroys the Plaintiff's Action; or it is temporary, and bars it only for a Time, as *Plene Administravit* is a good Plea until more Goods come to the Executor's Hands, &c. And so all Pleas in Abatement do suspend the Action until the Impediment or Obstacle be removed. *Inst. legal. 460, 473.*

Defendant may plead in Bar after Plea in Abatement or Demurrer.

And herein observe, that if the Defendant can have no Advantage by pleading in Abatement, or demurring in Law, he may afterwards plead in Bar of the Plaintiff's Action; and before he

he pleads any special Matter in Bar he may plead such general Bars as these.

(1.) Release or Defeasance, (2.) An Acquittance, (3.) Acceptance of other Things, (4.) Tender of Amends, (5.) Concord or Accord, (6.) Arbitrament, (7.) *Auterfoit's* Bar by former Judgment or Recovery, (8.) the Statute of Limitation, (9.) Disability of the Plaintiff, (10.) Privilege of the Defendant; or other Matter as the Case requires; by which it appears, that several Matters before mentioned to be pleadable in Abatement, may also be pleaded in Bar. *Inst. legal.* 520.

General Bars.

But note, That if the Defendant first pleads a Plea that doth tend to the Destruction of the Action for ever, he shall not be admitted after to plead in Abatement of the Writ; and yet, if there appears Matter in the Record for which the Writ ought to be abated, the Defendant may shew it to the Court in Arrest of Judgment. *Inst. legal.* 473.

No Plea in Abatement after Plea in Bar, but such Matter may be shewn in Arrest of Judgment.

For the many and various Kinds of Pleas in Bar, and the Forms thereof, and some curious Learning thereon. See *Instruct. Clerical.* V. 1st and 3d, and *Inst. legal.* p. 519 to 535.

A *Replication*, is an Exception made by the Plaintiff to the Defendant's Plea or Bar.

Replication.

Rejoinder.

A Rejoinder, is the Defendant's Exception or Answer to the Plaintiff's Replication.

Sur-Rejoinder.

A Sur-Rejoinder, is a second Defence of the Plaintiff's Declaration, and answers the Defendant's Rejoinder.

Rebutter.

And if the Defendant makes an Answer to the Plaintiff's Sur-Rejoinder, that is called a *Rebutter*.

Sur-Rebutter,
Demurrer and
Joinder in De-
murrer.

And if the Plaintiff replies thereto, it is called a *Sur-Rebutter*, and after all these there may be a Demurrer, and a Joinder in Demurrer.

Concerning Pleas and Pleadings in general.

Pleadings how
to be drawn.

All Pleas are to be succinct, without unnecessary Repetitions and to be direct and pertinent to the Case, and not by Way of Argument or Rehearsal; and the Pleas of every Man shall be taken most strongly against himself, for every Man is presumed to make the best of his own Case. 2 Lill. 304.

Order in plead-
ing

In good order of Pleading, a Man ought to plead, first, to the Jurisdiction of the Court; 2d, to the Person of the Plaintiff; 3d, to the Count or Declaration; 4th, to the Writ; 5th, to the Ac-
tion

tion of the Writ; 6th, to the Action
itself in Bar thereof. *Co. Lit.* 303.

Defendant may by Motion or Con- Plea withdrawn.
sent withdraw his special Plea, and plead
to the general Issue if there be no Join-
der in Demurrer. *2 Salk.* 515.

The Court will not direct any Person The Court will
not direct how to
plead.
how to plead altho' the Matter be diffi-
cult, and though they be moved to do
it, but will bid them plead at their own
Peril, because Counsel is to advise how
to plead, and the Court is only to judge
of the Pleadings whether they be good
in Law or not. *Inst. legal.* 461.

When the Court doth order the De- Issuable Plea to
be pleaded when
the Court orders
a Defendant to
plead.
fendant to plead, it is intended he shall
plead an issuable Plea, for every Plea
that a Man pleads ought to be triable
otherwise the Court can have no End.
Inst. legal. 461.

But where a Defendant has been But he may de-
mur.
indulged with Liberty to plead plead-
ing an issuable Plea, he may demur.

That which is alledged by way of In- Inducement to
the Matter.
ducement or Conveyance to the Sub-
stance of the Matter, need not be
certainly alledged as that which is
the Substance it self. *Co. Lit.* 303.
Plowd. 81.

Things

Things spiritual.

Things spiritual may be pleaded generally, and the Proceedings and Sentences in the Ecclesiastical Court may be alledged briefly, *Co. Lit. 303. Plowd. 65.*

Special or substantial Matter.

When any special or substantial Matter is alledged by either Party, that ought to be specially answered, and not to be passed over by a general Pleading. *Co. Lit. 303.*

Matter of Record.

So Matters of Record especially when they are the Foundation or Ground of the Suit of the Plaintiff, or the Substance of the Plea, must certainly and truly be alledged; otherwise, where it is but a Conveyance. *Ibidem* and *Plowd. 65.*

Insufficient Pleading helped by the adverse Party.

When a Count, Declaration, Bar, Replication, &c. are defective in respect of Omission of some Circumstances of Time, or Place, there it may be made good by the Pleading of the adverse Party; but if it be insufficient in Matter, it cannot be helped. So, uncertain Words in the Count or Declaration may be made good and certain by a Plea in Bar, by the Defendant's taking Notice of the Meaning of them, *2 Vent. Rep. 222. Co. Lit. 303.*

Ibidem.

And although Words are not actionable in themselves at the Time of speaking

ing of them, yet if an Action be brought for the speaking of them, they may be made actionable by the Defendant's pleading and explaining the Words. *Inst. legal.* 463.

The Plea must directly answer the Charge in the Plaintiff's Declaration or it will not be good. *1 Danv. Abr.* 235.

Plea to answer the Charge in the Declaration directly.

If it doth not answer all the Matter contained in the Plaintiff's Declaration, the Plaintiff shall have Judgment as for want of a Plea. *1 Lev.* 16.

Or Judgment.

A Defendant pleads that he did not receive 80*l.* but doth not say, or any part thereof, and the Plea was adjudged ill, for he might receive 79*l.* and not the Whole. *2 Mod. Rep.* 146.

And in pleading a Tender at the putting in of the Plea the Money is to be brought into Court or the Plea will not be accepted, but the Plaintiff shall sign Judgment. *2 Lill. Abr.* 308.

On a Plea of Tender the Money is to be brought into Court.

If a Thing is shewed in Pleading and is not afterwards traversed or averred specially to the contrary, it will be taken to be confessed, tho' the Confession of one Defendant in his Plea shall not pre-judice another. *Plowd.* 48. *Hob.* 64.

How a Thing in Pleading may be confessed for Want of a proper Traverse or Averment.

A Re-

A Release or
Discharge plead-
ed.

A *Release* pleaded to an Action of Trespass without shewing when it was made shall be taken before the Trespass done; and a Plea of Discharge or giving Notice must shew how given. 10 Rep. 40. *Plowd.* 128. *Dyer* 41.

Every Man's
Plea to be pro-
per for himself.

Every Man must plead such a Plea as is proper for him, but that need not be pleaded on one Side, that will come properly on the other. *Hob.* 3, 78, 162.

Plea amended.

The Defendant before Joinder in Demurrer, by Consent, or upon Motion, and paying Costs may amend his Plea; and so after Joinder in Demurrer before Judgment, and where a Defendant has demurred, and the Plaintiff joined, the Court do frequently allow him (upon Motion and paying the Plaintiff his Costs) to withdraw his Demurrer and plead to the Action if the Plaintiff hath not been put by a Trial. *Pract. Sol.* 303. See the Case of *Dixon* against *Wilkins* in this Court, *Easter Term*, 1678; and the Case of *Lombard* and *Lombard* against *Frazier* and *Bradshaw*, *Michaelmas Term*, 1744.

In the Case of *Kane* against *Hamilton* in the Court of Common Pleas, *Mich. Term*, 1732, the Defendant had Liberty to amend his Plea after Joinder
in

in Demurrer, and that the same had been argued by Council, paying Costs.

If after the Defendant hath pleaded the Plaintiff alters his Declaration, the Defendant may alter his Plea. 2 *Lill.*

Plea may be altered if Declaration be altered.

322.

If the Defendant pleads a dilatory or frivolous Plea to hinder the Plaintiff from going to Trial, the Court (on Motion,) will order the Defendant, to plead such a Plea, as he will stand by in four Days, or the Plea already filed to stand; and if the Defendant pleads not to Issue in the four Days the Plaintiff may demur to such frivolous Plea, and the Plaintiff's Attorney may then move the Court and obtain a Rule that the Defendant may join in Demurrer in four Days; and if the Defendant neglects so to do, the Plaintiff may at the Expiration of the four Days move on a Copy of the last Rule and a Certificate of no Joinder in Demurrer being filed for Judgment, and the Court will then order Judgment to be entered for the Plaintiff without further Motion.

Frivolous Pleas how to proceed when pleaded.

And if such Plea be pleaded towards the End of the Term, so that the Plaintiff can't proceed as aforesaid, he may move the Court on an attested Copy of such dilatory or frivolous Plea, that the Defendant may plead an issuable Plea in four Days, or in two Days, or

Ibidem.

Judg-

Judgment to be entered without further Motion, which the Court seldom refuses to grant.

Ibidem.

If by such Plea the Plaintiff is hindered from going to Trial, the Court on Motion and upon proper Notice given, will over-rule the Plea and give the Plaintiff Judgment by *Nihil Dicit*, this was so determined in this Court in the Case of *Damer* against *Bunbury*, *Michaelmas Term*, 1742.

General Issue to be entered where Pleadings amount to no more.

Pleadings which amount to no more than the general Issue are not to be allowed, but the general Issue shall be entered; and where the Defendant pleads the general Issue, he ought to plead so that the whole Matter in Question may be tried. 2 *Lill.* 302. 2 *Nelf. Abr.* 1246. 1 *Salk.* 349.

General Pleading allowed, and where.

If the Defendant is not constrained to plead a special Plea, he may plead the general Issue proper to the Action brought and give the special Matter in Evidence. And in many Cases general Pleadings are permitted to avoid Tedioufness and Multiplicity, and the Particulars shall come on the other Side, as in Case of a Condition to perform all Covenants in an Indenture, if all the Covenants be in the Affirmative, the Defendant may generally plead Performance of all; but if any be in the Negative, to so many he must plead specially;

cially; so if any of them be in the Disjunctive, he must shew which of them he hath performed; so if any of them are to be done upon Record, he must shew it specially. 1 *Inst.* 303. 8 *Rep.* 133. 2 *Danv. Abr.* 249. 2 *Nelf.* 1249.

Disjunctive or on Record.

Bonds and Deeds are to be pleaded with a *profert. hic in Cur. &c.* 1 *Roll. Rep.* 1261.

Bonds and Deeds how to be pleaded.

Surplusage shall never make the Plea vitious, but where it is contrary to the Matter before. *Inst. legal.* 462.

Surplusage.

Where a Thing rests in a Man's own Notice, he must plead it particularly, otherwise not. *Ibidem.*

Thing resting in a Man's own Notice.

A Man shall not plead any Thing afterwards, which he might have pleaded at first. *Cro. Jac.* 318.

Nothing to be pleaded after, which might have been at first.

A Man shall not take Advantage of his own Wrong by pleading, &c. *Ibidem.* 588.

When a dilatory Plea (as in Abatement) is over-ruled, there shall be a *Respondeas Ouster*; except an Issue be joined upon it, for then it is otherwise. Also upon over-ruling of a Plea which is pleaded in Bar of the Action, Judgment

Dilatory Plea when over-ruled a *Respondeas Ouster*.

Over-ruling a Plea in Bar, Judgment.

ment shall be given against the Defendant; for such a Plea is peremptory. *Inst. legal.* 464.

Conclusion when Defendant pleads to Issue.

And where the Defendant pleads to the Issue, the Conclusion shall be *et de hoc ponit se super patriam*.

And when Plaintiff pleads to Issue.

But where the Plaintiff pleads to the Issue, *et hoc petit quod Inquiratur per patriam*. Ibidem.

How to plead to the Action.

If a Man pleads to the Action he ought to demand Judgment *Si actionem*, &c. *Inst. legal* 464.

The Beginning and Conclusion of a Plea in Abatement.

A Plea in Abatement begins, *That the Defendant ought not to be compelled to answer the Bill aforesaid*, &c. or thus, *That he prays Judgment of the said Bill*, &c. and concludes to the Declaration thus, *Whereupon he prays Judgment of the Bill or Declaration aforesaid, and that the same be quashed*, &c.

How Defence is to be made.

Note, that in Pleas to the Jurisdiction, or to the Person, the Defendant cannot make above half a Defence; as thus, *Et pred. A. per I. S. Attornat Su. ven. et defendit vim et Injur.* without adding the Words, *Quando*, &c. (which Words make a full Defence) for by adding these Words, the Jurisdiction of the Court, and Ability of the Person are admitted. See 7 H. 6. 35. H. 6. *Pract. Reg.* p. 244. *Inst. legal.* 474.

Full Defence and half Defence.

And

And in Pleas to *Scire facias* the Defendant shall only say, *Venit et dicit*, without other Defence. See running Title *Scire facias*. How to plead to *Scire facias*.

When any Man pleads an Outlawry in Disability of the Person, he ought to shew forth the Record, *Sub Pede Sigilli*, (because the Plea is dilatory) unless the Record be in the same Court. But if he pleads an Outlawry in Bar, he shall have a Day to bring in the Record. *Co. Lit. 128. Dyer 228. Inst. legal. 482.* When Record of Outlawry to be presently shewed, and when a Day given to bring it in.

In a Plea in Bar, the Defendant in the Beginning says, *That the Plaintiff ought not to have or maintain his Action against him, &c.* and concludes to the Action thus: *He prays Judgment if the Plaintiff ought to have or maintain his Action against him, &c.* The Beginning and Conclusion of a Plea in Bar.

A Plea of Record ought to conclude, *And this he is ready to verify by the Record.* Conclusion of a Plea of Record.

Every Plea ought to be single and certain, and not to be double, or contain a Multitude of distinct Matters to one and the same Thing, whereto several Answers (admitting each of them to be good) are required, which will not be allowed; nor where the Defendant pleads two Matters, each of them being a sufficient Bar to the Action, unless one depends upon the other; and Pleas to be single and certain.

then if the Defendant may not have the last without the first, both may be admitted: yet when the Issue is taken by the Plaintiff upon the one, he cannot then have the Advantage of the Double-ness or Insufficiency of the Plea, for he hath waived the other. 11 Co. 52. 1 Vent. Rep. 48, 272. 2 Nelf. Abr 1254.

Double Plea.

A double Plea will not be good; for where there is a double Matter, no certain Issue can be taken: but a Plea is not double which contains divers Matters if it would not have answered the whole Declaration without alledging all those Matters in it, and which are necessary in the Defendant's just Defence. 2 Lill. Abr. 300. See 6 Ann. ch. 10.

Several Matters may be pleaded with Leave of the Court.

* By 6 Ann. ch. 10. pars. Any Defendant, or Tenant in any Action or Suit, or Plaintiff in Replevin, with the Leave of the Court, may plead as many several Matters as he shall think necessary for his Defence: *Provided*, that if any

* At first, Courts of Law were too nice in the Construction of this Act of Parliament, which is a general and remedial Law, but by the present Practice. a Defendant shall have Liberty to plead as many Matters as he shall be advised will be necessary to his Defence, and unless the Pleas are absolutely inconsistent, or contradictory one to the other, or *Prima facie* appear to be frivolous, the Courts will not on a Motion, consider whether they are material or not, as the Plaintiff may demur.

any such Matter shall upon a Demurrer joined be judged insufficient, Costs shall be given at the Discretion of the Court: or if a Verdict be found for the Plaintiff, or Demandant, Costs shall be given in like Manner, unless the Judge who tried the said Issue shall certify that the Defendant, or Tenant, or Plaintiff in Replevin, had a probable Cause to plead such Matter, upon which the said Issue shall be found against him.

By the said Act, no dilatory Plea shall be received in any Court of Record, unless the Party offering such Plea, do by Affidavit prove the Truth thereof, or shew some probable Matter to the Court to induce them to believe that the Fact of such dilatory Plea is true.

No dilatory Plea to be received unless the Truth of it be proved by Affidavit or some other probable Matter shewn.

Therefore Matter of Record in the same Court requires no Affidavit; and the Reason thereof arises from the foregoing Words of the Act, viz. (or shew some probable Matter, &c.) and nothing can more induce the Court to believe a Fact to be true than when it appears of Record.

But Matter of Record requires no Affidavit.

And by the said Act it is enacted, That where any Action of Debt shall be brought upon a single Bill, or any Action, or *Scire facias* upon a Judgment, if the Defendant hath paid the Money due upon such Bill, or Judgment, such Payment may be pleaded

Payment a good Plea in Bar to Debt on a single Bill, or an Action, or *Scire facias* on a Judgment.

in Bar of any such Action. And where an Action of Debt is brought upon a Bond, which hath a Condition or Defeazance to make void the same upon Payment of a less Sum at a Day, and Place certain; if the Obligor, his Heirs, &c. have before the Action brought, paid to the Obligees his Executors, &c. the Principal and Interest due by the Defeazance or Condition, tho' such Payment was not made strictly according to the Condition or Defeazance, yet it may be pleaded in Bar of such Action; and shall be as effectual a Bar as if the Money had been paid at the Day and Place according to the Condition, or Defeazance, and had been so pleaded.

Pending a Suit on a Bond with a Defeazance for making the same void on Payment of a lesser Sum, on such Sum being brought into Court the Defendant to be discharged.

And by the said Act it is further enacted, That if pending any Action upon any Bond with a Penalty, which hath a Condition or Defeazance to make void the same upon Payment of a lesser Sum, the Defendant shall bring into Court where the Action is depending, all the principal Money and Interest due thereon; and all such Costs as have been expended in any Suit upon such Bond; the said Money so brought in, shall be deemed to be in full Satisfaction of the said Bond, and the Court may give Judgment to discharge such Defendant from the same.

If the Defendant hath paid the Plaintiff any Part of the Sum for which he hath declared against him, the Defendant may in such Case tender to the Plaintiff the Sum really due to him with the Costs of Suit as far as he hath proceeded; and if the Plaintiff refuse to accept thereof, the Defendant may set forth such Tender and Refusal by way of Plea to the Plaintiff's Declaration, and upon such Plea (when ingrossed and signed by Counsel) the Defendant's Attorney may move the Court to have the same received, and for Liberty to lodge in Court the Sum due to the Plaintiff with the Costs of his Proceedings, and that the Plaintiff may proceed further at his Peril; and the Court will thereupon grant a Rule for that Purpose with an attested Copy whereof the Defendant must serve the Plaintiff or his Attorney.

Plea of Tender, and the Proceedings,

And this Motion to lodge the Money in Court may be made after the Defendant hath pleaded, or at any Time after the Declaration is filed and before a Trial is had, and the Court will grant it.

Motion to lodge the Money due may be at any Time before Trial.

Ordered, for the future, That no Officer is to receive any Pleadings into the Office that has any Interlineation therein.

11th Feb. 1714.
R U L E.
The Officer not to receive Pleadings with Interlineations.

25th May 1728.

R U L E.

All special Pleadings to be signed by Council.

Ordered, That the Officer of the Pleas Office of this Court shall not receive any special Declaration, Demurrer, or special Plea, unless the same be signed by Counsel.

In what Manner mutual Debts may be set against each other in Suits at Law.

By Statute 25 Geo. 2. ch. 8. In all Suits of Law, where there are mutual Debts between Plaintiff and Defendant, or if either Party sue, or be sued as Executor or Administrator, where there are mutual Debts between the Testator or Intestate, and either Party, one Debt may be set against the other, and such Matter may be given in Evidence upon the general Issue, or pleaded in Bar, as the Nature of the Case shall require, so as at the Time of his Pleading the general Issue where any such Debt of the Plaintiff, his Testator or Intestate is intended to be insisted on in Evidence, Notice shall be given of the particular Sum or Debt so intended to be insisted on, and upon what Account it became due, or otherwise such Matter shall not be allowed in Evidence upon such general Issue.

Of Protestando, Averment, Traverse, and Impar lance.

Protestando.

Protestando, is a Word made use of to avoid double Pleading in Actions; it prevents the Party that makes it from being

being concluded by the Plea he is about to make, that Issue cannot be joined upon it: and it is also a Form of Pleading where one will not directly affirm or or deny any Thing alledged by another or himself. In the first Case, it is where a Man pleadeth a Thing which he dares not directly affirm, or that he cannot plead for fear of making his Plea double; as in Title to Land by two Descents, the Defendant must plead one of them, and put the Word *Protestando*, (by *Protesting*) instead of *Dicit*; as to the other, *that such a one died seized, &c.* And in the last Case, when one is to Answer to two Matters, and by the Law he ought to plead but to one; then, in the Beginning of his Plea, he may say *Protestando*, (by *Protesting*) that such Matter is not true, and then add to his Plea *pro placito dicit*, (for *Plea saith &c.*) and so he may take Issue upon the other Part of the Matter. *Plowd.* 276. *Finch.* 359. *Pract. Attorney*, 3d Edit. Vol. 1. Pa. 171.

See the Stat. 6
Ann. ch. 10. part
Antea.

A *Protestando* must not be repugnant &c. and effectual Matters in Bar ought not to be taken in a Plea by *Protestation*. See *Jacob's Law Dict.* Tit. *Protestando*.

A *Protestando* is sometimes thus; *Protestando non Cognoscendo* such and such Things, *pro placito in hac parte dicit.* Ib.

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Averment.

Averment, (*Verificatio*, from the *Fr. A-
verer*, i. e. *Verificare, Testari*) is an Offer of
the Defendant to make good, or justify
an Exception pleaded in Abatement, or
Bar of the Plaintiff's Action; and it signi-
fies the Act as well as the Offer of justi-
fying the Exception; and not only the
Form but the Matter thereof. *Co. Lit.*
362.

General Aver-
ment.

Averments are of two Sorts, General,
and Particular; A general Averment is
the Conclusion of every Plea to the Writ,
or in Bar of Replications, or other Plead-
ings containing Matters affirmative, and
ought to be by these Words, *Et hoc pa-
ratus est verificare* (and this he is ready to
aver.)

Particular Aver-
ment.

A *particular Averment*, is where a
Thing is specially averred; as where the
Life of a Tenant for Life, or in Tail,
&c. is averred. So of the Age of a
Person, or that Places, Sums of Money
or Persons named, are one and the same.
Co. Lit. 362. *Pract. Att.* 3d Ed. vol. 1.
p. 172.

The Use of an
Averment.

The Use of an Averment, is to as-
certain that to the Court, which is gene-
rally or doubtfully alledged. In what
Cases an Averment is, or is not to be
made. See *Jacob's Law Dictionary*, Ti-
tle *Averment*.

By

By 6 *Ann.* ch. 10. No Advantage or Exception shall be taken of, or for, the Want of Averment of *Hoc paratus est verificare, or hoc paratus est verificare per Recordum*: But the Court shall give Judgment according to the very Right of the Cause, without regarding such Omission or Defect, except the same shall be specially and particularly set down and shewn for Cause of Demurrer.

No advantage to be taken for want of an Averment unless particularly shewn for Cause of Demurrer.

Traverse (from the *Fr. Traverser*) is used in the Law for denying of some Matter of Fact, alledged to be done in a Declaration or Pleading; upon which the other Side comes and affirms that it was done; and this makes a single and good Issue for the Cause to proceed to Trial. And the formal Words of a Traverse are in Latin *absque hoc*, and in English *without that* that such a Thing was done, or not, &c.

Traverse.

If one will take a Traverse to a Declaration, he ought to traverse that Part of it, the doing whereof, will make an End of the Matter for which the Plaintiff declares.

How to be taken.

Where the Defendant hath confessed, or given a particular Answer in his Plea to all the material Matters contained in the Declaration, there he need not take a Traverse; for when the Thing is answered

In what Case it need not be.

swered there needs no further Denial; and tho' in some Cases it is said there may be a Traverse upon a Traverse; yet one Traverse is enough to make a perfect Issue. *Pract. Att.* 3d Ed. Vol. 1. p. 172.

No Advantage to be taken for any immaterial Traverse, unless particularly shewn for Cause of Demurrer.

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Impar lance
what.

Impar lance (*Interlocutio sive Licentia Loquendi*) is derived from the (*Fr. Parler, to speak*) and in the common Law is taken for a Petition in Court of a Day to consider or advise what Answer the Defendant shall make to the Action of the Plaintiff, being a Continuance of the Cause till another Day, or larger Time given by the Court. And in this Court it is called a Continuance, and is expressed by a *Diēs Datus*, the Impar lance, by a *Licentia Interloquendi*, but in Effect they are the same Thing.

General and special.

And Impar lance is two Fold, (*viz.*) General and Special; General, when it is set down and entered in general Terms without any special Clause, thus, *And now at this Day, to wit, on the Morrow of all Souls next following, until which Day the aforesaid C. D. the Defendant*

dant hath Licence to imparl to the Bill aforesaid, and then to answer, &c. The Special Imparlance may also be said to be two-fold, (*viz.*) General and Special; the Words of the former (after desiring a further Day to answer) are *Saving to himself all and all Manner of Advantages and Exceptions, &c.* the Words of the latter are *Saving and reserving to himself all and all Manner of Advantages and Exceptions to the Writ, Bill, or Count.* And the Defendant has a general Imparlance of course, but the special Imparlance must be obtained from the Court, or by Consent.

Three Things are to be considered in Imparlance.

Three Things to be considered in Imparlance.

1st. *What must be done before Imparlance.*

2dly. *What may be done after a general Imparlance.*

3dly. *What after a special Imparlance.*

First What Things must be done before Imparlance, these are three-fold.

Lut. 83.

If a Defendant pleads to the Jurisdiction of the Court, he must do it *Instant* on his Appearance; for if he imparls, he owns the Jurisdiction of the Court by

A Plea to the Jurisdiction of the Court to be before Imparlance.

by craving Leave of the Court for Time to plead in. *Hard.* 365. *Lut.* 46. 1 *Peere Williams*, p. 477.

Prayer of View
of Land to be
before Impar-
lance.

Secondly, If the Defendant in a Plea of Land would have View, he must demand it before Imparlance; for by imparling he undertakes to defend the Lands mentioned in the Plaintiff's Count; and it wou'd be absurd in him to defend what he does not know. *Lut.* 83.

And also Plea
of *Semper para-*
zus or tender of
Money.

Thirdly, Whenever a Defendant pleads *Semper paratus*, as in Dower, and tender of Money, &c. it must be done before Imparlance; for by craving Time he owns he is not ready, and therefore falsifies his Plea. *Dy.* 300, 33. *Hob.* 62. *Hist. of the Common Pleas*, 148.

Secondly, What Things are to be pleaded after a general Imparlance, two Things only, *viz.*

1st. *Pleas in Suspension.*

2dly. *Pleas in Bar.*

Unless the Writ abate after such Imparlance, as if a Man be excommunicated after the Term in which there was an Imparlance allowed, such Excommunication may be pleaded after Imparlance. *Lut.* 1117. *Doct. Plit.* 224. *Hist. of the Common Pleas*, 149.

Third-

Thirdly, What may be pleaded after special Imparlanee.

All Pleas in Abatement, unless to the Jurisdiction, may be pleaded after the special Imparlanee. Privilege can be only pleaded after a special Imparlanee, because it is neither an Objection to the Writ, Bill, or, Count. *Hard.* 365. *Lut.* 46.

i *Sid.* 29. 2.---2. *Rolls Rep.* 244. Seem to be contrary, and that Privilege can't be pleaded after Imparlanee, it's not said in either of the Cases whether it be a special or general Imparlanee. But the latest Resolutions, viz. *Hardress* and *Lutwich* are express in Point that it may be pleaded after a special Imparlanee; for it does not oust the Court of their Jurisdiction, but is a Privilege which each Court allows to the Officers of another to be sued in their own Court. See *Ld. Ch. Bar. Gilbert's Hist. of the Court of Common Pleas*, p. 147, 148, 149.

Replication and Rejoinder.

When the Defendant hath pleaded to the Plaintiff's Declaration, he may forthwith put a Rule upon the Plaintiff to reply in four Days, or that Judgment may

Certificate of no
Replication.

may be awarded against him; and if the Plaintiff doth not in four sitting Days after such Motion is made, file his Replication, the Defendant may at any Time, after the said four Days are expired, take out a Certificate of no Replication, and upon Motion of the Defendant's Attorney thereon, the Court will grant the Defendant Judgment, against the Plaintiff without further Motion.

Motion for Time
to reply.

After the Rule is conceived for the Plaintiff to reply, he may at any Time before the Rule for Judgment upon the Certificate of no Replication is obtained, upon Motion by his Attorney and upon Cause shewn to the Court, obtain a Rule for further Time to reply: And the Court seldom refuses it, as the Delay in this Case is supposed to be to the Plaintiff's own Disadvantage.

Replication to
contain Cer-
tainty.

The Replication is to contain Certainty, and not to vary from the Declaration, but must pursue and maintain the Cause of the Plaintiff's Action, otherwise it will be a Departure in Pleading, and going to another Matter. 1 *Inst.* 304.

In what Cases
made good by
the Rejoinder.

As a faulty Bar may be good by the Replication, so sometimes a Replication is made good by a Rejoinder; but if it wants Substance a Rejoinder can never help it. 2 *Lill. Abr.* 462.

A Re-

A Replication being entire, and ill in Part, is ill in the Whole: But if there be three Replications and one of them is superfluous, and the other two sufficient, and the Defendant demurs generally, the Plaintiff may have Judgment upon those which are sufficient, 1 *Saund.* 338. 2 *Saund.* 17.

Replication ill in Part ill in the whole.

In Debt, if the Defendant pleads a Release of the Plaintiff, and doth not shew where it was made, the Plaintiff replies and pleads not his Deed, the Plea of the Defendant is made good by this Replication. *Br. Tit. Repleader*, 28.

Plea made good by Replication.

If the Bar is nought, and the Replication likewise, the Plaintiff never shall have Judgment. *Hob.* 13. *Style.* 356.

So if there is a Variance between the Declaration and the Replication, tho' there be a Verdict, &c. *Goldsb.* 150.

Replications conclude with *boc paratus est verifcar*, or to the Country. 1 *Lutw.* 98.

Replications their Conclusion.

Rejoin-

Rejoinder.

Certificate of no
Rejoinder and
Motion for Judgment.

When the Plaintiff hath filed his Replication, he may forthwith put a Rule upon the Defendant to rejoin in four Days or that Judgment may be awarded against him ; and if the Defendant doth not in four sitting Days after such Motion file his Rejoinder, the Plaintiff may, when the said four Days are expired, take out a Certificate of no Rejoinder, and upon Motion of the Plaintiff's Attorney thereon, the Court will grant Judgment against the Defendant without further Motion.

Motion for Time
to rejoin.

After the Plaintiff has obtained a Rule for the Defendant to rejoin, the Defendant's Attorney at any Time before the Plaintiff obtains the Rule for Judgment absolute against the Defendant, may upon Motion, and Cause shewn, obtain further Time to rejoin. But as these Motions are frequently contrived by the Defendant to delay the Plaintiff and to hinder him from going to Trial, the Court will not grant them but upon good Cause shewn.

Rejoinder not to
depart from the
Plea.

If the Defendant in his Rejoinder departs from the Plea pleaded in Bar, the Rejoinder is not good. Also the Defendant is not to rejoin in such Words as are not contained in the Replication, or Plea, for that is to begin a new Discourse
of

of his own and not to Answer the Plaintiff.

When the Defendant in a Rejoinder pleads new Matter, he may conclude, *Et hoc paratus est verificare*; for he ought to give the Plaintiff Leave to come in with a *Sur-rejoinder* and Answer it. *Inst. Legal* 469.

How to conclude the Rejoinder if new Matter be pleaded therein.

In Debt upon a Bond to perform an Award, the Defendant pleaded *Nul Arbitrament*, and upon the Plaintiff's shewing it, the Defendant rejoined that the Arbitrament was not tendered according to the Condition of the Bond, and it was adjudged a Departure from the Plea in Bar, and the Court gave Judgment upon the Departure. *2 Saund. 189, 190.*

Judgment upon a Departure from the Plea in Bar.

And it is said, that where the Defendant in Trespass, &c. fortifies his Bar with new Matter in his Rejoinder but pursuant to the Bar, and goes before the Bar in conveyance of his Title, this is no Departure. *See 21. Edw. 4. 12. Plowd. Comment 105. Co. Lit. 104.*

No Departure for the Defendant to fortify his Plea.

Lease pleaded at common Law in Bar, and upon the Statute in the Rejoinder, is a Departure. *Dyer 10. and Dyer 102, 103.* the Rejoinder is said to be a Departure, because it did not go with the Bar nor inforce it.

Plea in Bar at Common Law and Rejoinder upon the Statute a Departure.

New Answer in the Rejoinder, where new Matter in the Replication no Departure.

Yet it is said, that in many Cases, if new Matter be set forth in the Replication, if the Defendant alledges a new Answer in the Rejoinder, it is no Departure. *Vid. Mod. Rep. 43, 44. 227. 289.*

Note the Rules are the same *E. Converso* as to the *Sur-rejoinder, Sur-rebutter, &c.*

Demurrer.

Demurrer what.

Demurrer (in Latin *Demorare*, from the French *Demurrer*) is a kind of a Stop put to any Action upon a Point of Difficulty; which must be determined by the Court, before any further Proceedings can be had therein: for in every Action, the Controversy consists either in Fact, or in Law; if in fact, that is tried by the Jury; but if in Law, the Judge with his Associates proceeds to Judgment; and whatever they conclude, stands firm without any Appeal. See *Jacob's Law Dict. Title Demurrer.*

How expressed.

This *Demurrer* is in our Records expressed by *Moratur in lege*; and when any Action is brought, and the Defendant saith that the Plaintiff's Declaration is not sufficient for him to Answer unto; or when the Defendant pleads, and the Plaintiff says that it is not a sufficient Plea in Law, and the Defendant says that

that it is a good Plea, and thereupon both Parties submit to the Judgment of the Court, this is a *Moratur in lege*. 1. *Lill Abr.* 435.

So that a *Demurrer* is an Issue joined upon Matter of Law, and a referring to the Judgment of the Court, whether the Declaration or Plea of the adverse Party is sufficient in Law to be maintained. *Finch lib.* 4. *ch.* 40. 1. *Inst.* 71.

A *Demurrer* may be to any Part of the Pleadings; also a *Demurrer* may be to a *Demurrer*; as where the *Demurrer* is double, and he who demurs Assigns one Error in Fact, and another in Law, which is ill, and may be demurred unto on the other Side. 1 *Lill* 438.

After the Defendant has pleaded in Abatement and before he pleads directly in Bar, he may demur to the Count or Declaration, even after an Imparance. *Inst. Legal*, 513.

Demurrers are either general, or special; general, without shewing any Cause, but only *Quod Narratio vel placitum, &c.* *Materiaque in eadem contenta minus sufficiens in lege, &c.* A special *Demurrer*, is where the Causes of Demurring are particularly set down.

In general *Demurrers*, the Causes are shewn in general, thus, that the Plea, General *Demurrer*,
L 2 &c.

Ec. is repugnant, double, uncertain, and wanteth Form, *Ec. Pract. Attor. 3d Edit. Vol. 1. Page 173.*

The Judgment of the Court to be only pray'd by Demurrer.

The Judgment of the Court is not to be prayed upon an insufficient Declaration, or Plea, otherwise than by a *Demurrer*, when the Matter comes judicially before the Court.

General Demurrer to an insufficient Pleading or for Want of Substance.

If in pleading, *Ec.* a Matter is insufficiently alledged, that the Court cannot give certain Judgment upon it, a general *Demurrer* will suffice; and for Want of Substance a general *Demurrer* is good: But for want of Form, there must be a special *Demurrer*, and the Causes specially Assigned.

Special Demurrer for want of Form.

All Matters of Fact well pleaded are confessed by a general *Demurrer*.

And no Advantage can be taken of any other Matter of Form but what is expressed is the special *Demurrer*, but of matter of Substance.

As he that demurs generally confesseth all Matters of Fact that are well and sufficiently pleaded; so he that makes a special *Demurrer*, can take no Advantage of any other Matter of Form than what is expressed in his *Demurrer*; but he may take Advantage of Matter of Substance, tho' the *Demurrer* be special, and the Cause set down. 10. *Rep.* 88.

No Advantage in Arrest of Judgment if Defendant pleads where he may demur.

In all Cases, if the Defendant pleads where he may demur, he cannot afterwards take Advantage in Arrest of Judgment, Writ of Error, *Ec. Plowd.* 182.



After

After Plaintiff and Defendant have joined Issue, which goes to the whole, neither of them can demur without Consent of the other; but one may demur to one part of a Declaration, and plead to the other *quoad*, &c. and where Issue is joined for Part, and a Demurrer for the Residue, the Court may direct the Trial of the Issue, or judge the Demurrer first at their Pleasure; though it is usual to give Judgment on the Demurrer first, because when the Issue comes afterwards to be tried, the Jury may assess Damages for the whole. 1 *Lill Abr.* 437. 1 *Inst.* 71. 1 *Saund.* 80. *Trial per Pais* 27.

No Demurrer after Issue but by Consent.

Demurrer to Part and Issue to Part, and the Court may proceed first on either.

There cannot be a Demurrer in Abatement; and where a Defendant demurs only in Abatement, the Court may give final Judgment. But it may be to a Plea in Abatement. 1 *Salk.* 220. 1 *Nelf. Abr.* 634.

No Demurrer allowed in Abatement, but may be to a Plea in Abatement.

If any special Matter be pleaded, which hath the Colour of a Plea, but amounts to the general Issue, 'tis no Cause of Demurrer. 5 *Mod.* 18.

Special Matter pleaded amounting to the general Issue no Cause of Demurrer.

Where there is a Demurrer to part, and Issue is joined upon the other Part, and the Plaintiff hath Judgment on the Demurrer, here he may enter a *Non pros* as to the Issue, and proceed to a Writ of Enquiry upon the Demurrer. But otherwise he cannot have such Writ of Enquiry 1 *Salk.* 219.

Demurrer to part and Issue to part after Judgment on the Demurrer, Plaintiff may enter a *Non pros* to the Issue.

A Party delayed by Demurrer, the Court on Motion will grant a short Day for arguing it.

A Demurrer is to be signed, and argued on both Sides by Council; and if a Party be delayed in his Proceedings by Demurrer, he may move the Court to appoint a short Day after to hear Council on the Demurrer, and the Court will grant it. *Trin. 23. Car. Banc. Reg.*

Judgment on a frivolous Demurrer.

The Court will not allow of a Demurrer to delay Proceedings, or to put off a Trial; but will give Judgment against the Party for his frivolous Demurrer. *Inst. Legal, 516.*

In what Case the Court will give immediate Judgment on a Demurrer, and when it is sent into the Exchequer Chamber.

If the Points on a Demurrer are apparent and easy to determine, the Court will proceed to give Judgment on it presently; but if it be doubtful or difficult, they will take Time to consider of it, and give a Day to the Parties; and if the major Part of the Judges of the Court can't determine the Matter on the Demurrer, it is to be sent into the Exchequer Chamber to be argued by all the Judges. 1 *Inst. 71. Pract. Attor. 3d Edit. Vol. 1. 174.*

After Issue, no Demurrer but by Consent.

After Issue is joined which admits the Pleadings to be good, neither of the Parties can demur without Consent of the other, where the Issue goes to the whole. And a Demurrer once entered, cannot be waived without Consent, and Leave of the Court. *Pract. Attor. Vol. 1. 3d Edit. 174.*

And Demurrer not to be waived but by Consent.

When

When the Plaintiff demurs to the Defendant's Plea, the Practice is, immediately to put a Rule upon the Defendant to join in Demurrer in four Days; and if the Defendant doth not in four sitting Days after such Motion join in Demurrer, or obtain further Time, (which the Court upon Motion or Cause shewn will grant) the Plaintiff may when the said four Days are elapsed, take out a Copy of the Rule, and a Certificate of no Joinder in Demurrer being filed; and upon Motion thereon by Attorney, the Court will give Judgment absolute. And the Practice is the same on a Demurrer by the Plaintiff to the Defendant's Rejoinder.

Demurrer by the Plaintiff to the Defendant's Plea or Rejoinder, and the Practice and Proceedings thereon if no Joinder by the Defendant.

And on a Demurrer by the Plaintiff to the Defendant's Rejoinder.

So if the Defendant demurs to the Plaintiff's Declaration, he may forthwith put a Rule upon the Plaintiff to join in Demurrer in four Days; and if the Plaintiff doth not in four sitting Days after such Motion join in Demurrer, the Defendant's Attorney may when the said four Days are expired, move upon a Copy of the Rule, and a Certificate of no Joinder in Demurrer for Judgment against the Plaintiff, which the Court will grant him without further Motion. And the Practice is the same on a Demurrer by the Defendant to the Plaintiff's Replication.

Demurrer by the Defendant to the Plaintiff's Declaration or Replication, and the Practice and Proceedings thereon if no Joinder by the Plaintiff.

And on a Demurrer by the Defendant to the Plaintiff's Replication.

The Practice
and Proceedings
in case the De-
fendant joins in
Demurrer.

When a Plaintiff demurs to the Defendant's Pleading, and Joinder in Demurr is filed by the Defendant, the Plaintiff's Attorney may apply to the Officer of the Court to enter a Rule for appointing the next Law Day for reading the Record of the Demurrer, which he accordingly enters of course: And the Plaintiff or his Attorney, is then to get the Record made up in the Office of Pleas; and on the Day appointed for reading it, a Motion is to be made by the Plaintiff's Counsel for a *Consilium*, or a Day for arguing the Demurrer; whereupon, and upon the Officer's reading a Word of the Record, the Court appoints a Day, and a Rule for that Purpose is entered in the Rule Book; then Paper Books are to be made up and delivered to the Barons.

If Plaintiff proceeds not after Defendant has joined in Demurrer the Defendant may proceed thereon.

If the Plaintiff neglects to proceed after the Defendant has joined in Demurrer as aforesaid, the Defendant's Attorney may, upon Motion, obtain a Rule, that the Plaintiff do make up and enrol the Record of the Demurrer in two Days (or in such Time as the Court shall think reasonable) or that the Defendant may be at Liberty to make up and enrol the same, and proceed thereon. See *Hillary Term, 1745, Thompson against Lynch*.

When

When the Defendant demurs to the Plaintiff's Declaration, or Replication, and the Plaintiff has joined in Demurrer, he may get the Record made up, and a Rule entered of course for reading a Word of it as aforesaid; and he may then move the Court by his Counsel that the Defendant may maintain his Demurrer the next Law Day, or that Judgment may be entered for the Plaintiff: And if the Defendant doth not appear to maintain his Demurrer in such Time as the Court shall appoint for that Purpose, the Court, on Counsel's Motion, will give the Plaintiff Judgment without further Motion.

The Practice and Proceedings when the Plaintiff joins in Demurrer.

Judgment if the Defendant proceeds not after Plaintiff hath joined in Demurrer.

The whole Record is not to be read on opening the Demurrer, except the same be to the Declaration only; but if a Demurrer be filed only for Delay, the whole Record will be heard by the Court, tho' there be a Plea, &c. And if upon reading the Record, and upon examining the Defendant's Attorney, it appeareth that the same is merely for Delay, the Court on Motion, has ordered Judgment to be entered for the Plaintiff without a Day given the Defendant. See *Jacob's Law Dict.* Title *Demurrer*.

In what Case the whole Record is read on opening the Demurrer.

The Demurrant argues first, and if the Action be in Debt, and the Court gives Judgment for the Plaintiff in the Action,

Judgment in Demurrer for the Plaintiff.

Action, the Judgment is for the Plaintiff to recover his Debt, Cost, and Damages as if the Defendant had pleaded, and there had been a Verdict for the Plaintiff: But if the Action be on the Case, a Writ of Inquiry of Damages must be awarded, as in Judgments in Actions on the Case. *Ibidem.*

Judgment in Demurrer for the Defendant.

But if upon the Demurrer, Judgment shall be given for the Defendant in the Action, the Judgment is that the Plaintiff *Nibil capiat per Billam*, and that the Defendant *Eat sine die*: and as the Plaintiff by the Judgment loses his Action at common Law, the Defendant had no Costs given him: but now by the Statute of 4th Geo. 1st. the Defendant shall recover his Costs. *Ibid.*

Plea amended after Joinder in Demurrer.

Where the Plaintiff demurs to the Defendant's Plea, tho' the Defendant hath joined in Demurrer, yet the Court will upon Counsel's Motion, give the Defendant Leave to amend his Plea, pleading to Issue, and paying Cost; and also where the Defendant has demurred and the Plaintiff joined, the Court often suffers him to withdraw his Demurrer, and plead, pleading an issuable Plea, and paying Costs; It was so ordered in the Case of *Lombard* and *Lombard* against *Frazier* and *Bradshaw*, in this Court in *Michaelmas Term*, 1744, tho' the Demurrer had been argued several Days. But this will not be granted if the Plaintiff

Demurrer withdrawn by Defendant.

tiff has been put by a Trial. *Pract. Attor.* 3d Edit. Vol. 1st. p. 291.

Where the Defendant either demurs, or joins in Demurrer, to a Plea in Bar, and is over-ruled, he has no *Respond. Ouster* but shall be condemned presently, and Costs allowed, and the Judgment against him is the same as by Default. But where a Demurrer is to a Defendant's Plea in Abatement, a *Respond. Ouster* is granted if the Plea be found insufficient. *Ibid.* 291, 292.

Demurrer over-ruled, and in what Cases Defendant may have *Respond. Ouster*.

And generally, when upon Argument the Plaintiff's Default comes to be discovered, on his praying it, the Court allows him Liberty to amend paying Costs, and orders the Defendant presently to plead to issue. *Ibid.*

Plaintiff may move the Court to amend upon Argument of the Demurrer.

If the Plaintiff allows the Demurrer, the usual and proper Judgment for the Defendant is, *Ideo Consideratum est quod praediēt. A. Nihil capiat per Billam suam praediēt. sed pro falso Clamore suo inde sit in misericordia, et praediēt. B. eat sine die, &c.*

How the Defendant is to enter his Judgment if the Plaintiff allows the Demurrer.

In this Case, the Plaintiff pays Cost, and may begin his Suit again ; but sometimes the Defendant's Attorney goes to the Office and gets the Judgment entered thus *quod praediēt. Bill. Cassetur*. If the Judgment be thus made up, it will be an absolute

absolute

absolute Bar to the Plaintiff; and if he should bring a new Action for the same Thing, this Judgment may be pleaded in Bar thereof; therefore, to prevent this, let the Plaintiff's Attorney, when the Demurrer is allowed serve a Notice in writing on the Officer, that he may give him (the Plaintiff's Attorney) Notice to be present on making up the Judgment; and for want of this Caution many Judgments are thus entered against Plaintiffs.

29th April 1681.

RULE.

Copies of the
Record in De-
murrer for the
Judges.

Ordered, that for the future in all Causes upon Demurrers joined, or special Verdicts returned, after the same have been read in Court, and spoken to and argued by Counsel of both Parties Plaintiff and Defendant, that then immediately the Attornies or Parties concerned in such Records of Demurrer, or special Verdict, do of course, and without Motion in Court, take out Copies of the same to be presented to the several Barons of this Court, wherein both Parties are to join at equal Charge, to the End the Court may the better proceed to give their Judgment on the same.

This Rule was made to prevent the Delays which happened in preparing Copies of the Record upon Demurrers and special Verdicts.

14th May 1681.

RULE.

No Demurrer to
be received un-
less the Copy of

Ordered by the Court, that for the future no Demurrer be received or filed unless the Copy of such Pleadings to which

which the Demurrer is to be filed be the Pleading to
first taken out of the Pleas Office of this which it is, be
Court. taken out.

Ordered, that for the future, Copies 11th Feb. 1683.
of Records upon Demurrers, and special RULE.
Verdicts for the Consideration of the Copies of the
Court, be made out upon the Direction Records for the
of the Court. Barons.

Ordered for the future, that all Rules 29th June 1685.
for reading of Records upon Demurrer RULE
and upon special Verdicts be entered of Rules for reading
Course by the Officer of the Pleas without Demurrers to be
Motion in Court. entered of course.

Ordered, that all Causes which lie un- 28th Nov. 1695.
der *Cur. advisar. vult*, Copies of the Re- RULE.
cord be prepared for the Court. Causes where
Cur. advisar. vult
copies of the Re-
cord to be pre-
pared for the
Court.

The several Statutes relating to Demurrer.

IT is enacted by Statute 10. Car. 1. After Demurrer
ch. 11. That after Demurrer joined joined, Judgment
and entered in any Suit, the Judges shall to be without re-
proceed and give Judgment according to garding want of
the very Right of the Cause and Matter Form in Process
in Law shall appear to them, without but what is ex-
regarding any Imperfection, Defect, pressed in the
or Want of Form, in any Writ, Return, Demurrer.
Plaint, Declaration, or other Pleading,
Process or Course of Proceedings whatso-
ever, except those only, which the Party
demurring

demurring shall specially and particularly set down and express together with his Demurrer: and that no Judgment to be given shall be reversed by any Writ of Error for any such Imperfection, &c. as aforesaid, except only such as is before excepted.

The Court may amend.

After Demurrer joined and entered, the Court may amend all such Imperfections, &c. as above mentioned, other than those only which the Party demurring shall specially and particularly express and set down with his Demurrer as aforesaid.

To what this Act extends not.

This Act not to extend to the Proceedings in any Appeal of Felony or Murder; nor to any Indictment of them, or Treason, or any other Matter, or Action; or Information upon popular, or penal Statutes.

The Intent of the Act.

The above Statute was made to Remedy the excessive Charges and Expenses, and great delay and hindrance of Justice in Actions in Suits, by Reason, that upon some Mistakings, or want of Form in Pleading, Judgments were often reversed by Writs of Error, and upon Demurrers, Judgment was often given against the Right and Justice of the Case, whereby the Parties were constrained, either utterly to lose their Right, or else after long Time and great Trouble

Trouble and Expences to renew their Suits again.

By 9 Will. 3 ch. 35. Upon any Demurrer joined in any Suit, in any Court of Record, by any Plaintiff, or Defendant, or Tenant, the Party for whom Judgment shall be given therein, shall have Costs, to be awarded by the Court as if Judgment had been given by Verdict.

Cost upon Demurrer.

And if any after the said Time shall obtain such, or any other Judgment in any of the King's Courts of Record in this Kingdom, and the Defendant therein shall bring a Writ of Error, and afterwards the Judgment shall be affirmed, or the Writ of Error discontinued, or the Plaintiff therein become non Suit; in every such Case, the Party, or Parties, against whom such Writ or Writs shall be so brought, shall have Costs and Damages at the Discretion of the Justices, and shall have Execution for the same by Writs of *Capias ad Satisfaciendum*, *Fieri facias*, or *Elegit*, at the Parties Election.

Costs in Error, at the Discretion of the Court, and Execution for them.

Also if any bring an Action of Waste, or of Debt upon the Statute for not setting forth of Tythes, in which Action, the single Value or Damage found by the Jury shall not exceed three Pounds, the Plaintiff therein, recovering either by Judgment upon Verdict, or Demurrer, shall

Costs on Judgment on Demurrer in Actions of Waste or of Debt, or for not setting forth of Tythes.

shall have Costs at the like Discretion of the Justices as aforesaid. And if in any of the said Suits, the Plaintiff become non Suit, discontinue the Action, or a Verdict pass against him, the Defendants in such Case shall have Costs of Suit, and may sue forth such Executions for their Costs as above shew'd.

This Act not to extend to Executors or Administrators.

Provided, that no Alteration shall be made in any of the Cases aforesaid, where any Executor or Administrator shall be Defendant in any of the Suits aforesaid so at any Time hereafter to be brought against them, but that in all such Cases they shall not be liable to pay Costs of Suit, otherwise than as the Law now requires.

Court may after Demurrer joined give Judgment though defect in form, &c. might formerly have been taken to be matter of substance and not aided by 10. Car. 1. c. 11.

By 6 Ann. c. 10 pars. Where any Demurrer is joined in any Suit in any Court of Record, the Judges shall proceed and give Judgment according as the very right of the Cause and Matter shall appear to them, without regarding any Imperfection, or want of Form in any Writ, Return, Complaint, Declaration, or other Pleading, Process, or Course of Proceeding except those only, which the Party demurring shall specially set down and express together with his Demurrer as Causes of the same, notwithstanding that such Imperfection or Defect might heretofore have been taken to be Matter of Substance, and not aided by 10 Car.

I. C.

1. C. 11. So as sufficient Matter appear in the said Pleadings, upon which the Court may give Judgment according to the very Right of the Cause.

Repleader, (*Replacitare*) is to plead Repleader what, that again which was once pleaded before; where the Pleading hath not brought the Issue in Question which was to be tried.

On an immaterial Issue in a Cause, In what Cases. a Repleader may be awarded, but not upon an impertinent or uncertain Issue; nor after a Writ of Error has been awarded; nor after a Demurrer, but after Issue joined, *Sed Quaer. Vide 6 Mod. 2, 3, 102. Latch. 147. 3 Lev. 440.* And for the Form of a Repleader. *Vide Lutw. 1622.*

If a Verdict be given where no Issue was joined, there must be a Repleader to bring the Matter to Trial, &c. After Verdict where no Issue is joined.
2 *Lil. Abr.* 460.

In Debt on a Sheriff's Bond for the Defendant's Appearance in *B. R.* upon the Return of the Writ, the Defendant pleaded that he had appeared *Secundum*, &c. and upon this they were at Issue; and there being a Verdict for the Plaintiff, a Repleader was allowed, because the Appearance was not triable by a Jury
M ry

Where a Matter is not triable by the Jury but by the Record.

ry, but by the Record. 1 Leon. 90, 3.
Nelf. Abr. 123.

A Repleader not
to be awarded
before Trial.

It was laid down by the Court in the
Case of *Staple and Heyden*, Trin. 2 Ann.
B. R. Salk. 579. First, that at common
Law a Repleader was granted before
Trial, because a Verdict did not cure an
immaterial Issue; but that now a Re-
pleader ought never to be awarded be-
fore Trial, because the Fault in the Issue
may be helped by the Trial, by the Sta-
tute of *Jeofails*.

Repleader denied
where it shou'd
be granted or e
Converso, Error.

2dly. That if a Repleader is denied
where it should be granted, or granted
where it should be denied, it is Error.

The Judgment
in Repleader.

3dly. That the Judgment in Replead-
er is general, viz. *Quod partes replaci-*
sent: And the Parties must begin a-
gain at the first Fault which occasioned
the immaterial Issue. That if the De-
claration, the Bar, and the Replication
be all ill, they must begin *de novo*, but
if the Bar be good, and the Replica-
tion ill, they must begin at the Repli-
cation.

No Costs on ei-
ther side.

4thly. No Costs are allowed on either
Side.

And no Replead-
er after a De-
fault.

5thly. And that a Repleader cannot
be awarded after a Default.

Oyer.

Oyer.

WHERE a Man brings an Action of Debt upon a Bond, or other Deed, and the Defendant appears, and prays that he may hear the Bond, &c. wherewith he is charged, it shall be allowed him: And this is what in our Law we call *Oyer of a Deed.* 2 *Lill. Abr.* 266. And this Term is taken from the *French Word Oyer* to hear.

Oyer of Bonds
&c. what.

And to demand Oyer of an Obligation, &c. is not only to desire the Plaintiff's Attorney to read the same, but to have a Copy thereof that the Defendant may consider what to plead. *Hob.* 217.

The Demand of Oyer is a Kind of Plea, and may be counter pleaded, and where there may be Oyer, the Party is not bound to plead without it; but the Defendant may plead without it if he will on taking upon him to remember the Bond, or Deed; though if he plead without Oyer, he cannot afterwards waive his Plea and demand Oyer. *Mod. Caf.* 28. 3 *Salk.* 119.

Defendant not
bound to plead
without Oyer
but may if he
will.

But cannot
waive his Plea
and demand
Oyer.

When a Declaration is filed in this Court upon a Bond, or Deed, and the Defendant would have Oyer thereof be-

Rule for Oyer
and how entered.

fore he pleads, in such Case, the Defendant's Attorney may enter a *Petit Oyer*, or Prayer of *Oyer* in the Rule Book; and thereupon the Officer will stop from entering any further Rule to plead; and this Prayer of *Oyer* is to be entered under the second * Rule to plead, and if the Defendant omits doing it before the third Rule to plead be entered, he cannot afterwards stop the Plaintiff or oblige him to give *Oyer*, but by Leave of the Court, which will be granted upon an Attorney's Motion; and in this Case, the Plaintiff is to be served with this Rule for giving *Oyer*; and when *Oyer* is given, the Plaintiff's Attorney may then move for Liberty to proceed; but generally he proceeds without such Motion, and the Defendant has the same Time to plead after *Oyer* is given as he had when *Oyer* was demanded, but if he be stinted in Time, the Court will of course on Motion of his Attorney give him four Days to plead. See the Case of the Corporation of *Waterford* against *Morris* and *Morris* in this Court, *Easter Term*, 1757.

Misnomer to be
pleaded without
creaving *Oyer*.

If there be Misnomer in a Bond, the Defendant is to plead the Misnomer, and

* Formerly, as appears by the Rule Books, in 1687, the Prayer of *Oyer* was entered at the Foot of the third Rule to plead, but some Inconveniencies attending Plaintiffs in that Course with regard to Delays, it was changed in some Time after the aforesaid Period, and the present Practice established.

and that he made no such Deed, without creaving Oyer; for if he doth he admits his Name to be right. 1 *Salk.* 7.

Executors bringing Action of Debt, Oyer of a Will.
the Defendant may demand Oyer of the Testament, &c. See *Jacob's Law Dictionary*, *Tit. Oyer*.

The Defendant cannot have Oyer of a Deed in a common Case after Imparlance. 2 *Lev.* 190. *Lutw.* 238. *Quare* if this be not only meant of a general Imparlance. Defendant can't have Oyer after Imparlance.

Where an Action of Debt is brought upon a Bond given for the Performance of Articles, the Plaintiff is not obliged to give Oyer of the Articles, he is only obliged to give Oyer of the Deed he declares upon. *Pract. Reg.* 276. Debt on Bond for Performance of Articles Plaintiff not obliged to give Oyer of the Articles.

Altho' the Plaintiff cannot compel the Defendant to plead until Oyer be given where it is demanded, yet the Plaintiff it is said may refuse to discover the Names of the Witnesses to the Deed, or Bond, or to set forth the same in any Copy thereof to be given to the Defendant, *Sed quaere*, for after *proferet* of a Deed it is considered as in Court. Plaintiff not to discover the Witnesses Names.

The Defendant is to pay the Plaintiff for the Copy of the Deed or Bond, and if the Defendant refuses paying for the Copy, the Plaintiff may move the Court Defendant to pay for the Copy of the Deed &c. or Plaintiff on Motion may lodge it in the

Office and go on
with the Rules
to plead.

for Liberty to go on with his Rules to plead upon lodging a Copy of the Bond or Deed (of which the Defendant demands Oyer) in the Office of Pleas, which Motion the Court will grant; and the Officer when the Copy is lodged will go on with the Rules to plead, and will not part with the Copy without the Fees.

Plaintiff's At-
torney to attest
the Copy.

The Copy of the Bond or Deed is to be compared and examined with the Original by the Plaintiff's Attorney, who is to write his *Examinatur* at the Foot of the Copy, and to attest the same; and the Defendant may, when the Copy is delivered to him insist upon having the original Writing read to him; and when the Copy is lodg'd with the Officer of the Court, the Plaintiff's Attorney in this Case must at the same Time read the original Bond or Deed to the Officer.

On lodging the
Deed &c. with
the Officer
Plaintiff's At-
torney to read it
to him.

How this Copy
and the Copies
of Pleadings are
to be made out.

And note, if the Bond or Deed contain much Writing, it may be copied Sheet ways in wide Lines like the Copies of Pleadings made out in the Office; and each Sheet is to contain fourteen Lines, and each Line six Words, and the Plaintiff's Attorney is entitled to Six pence for every Sheet the Copy shall contain; but if there be but little Writing in the Bond, or Deed, it is to be close copied, and for this he is to be paid one Shilling and Six pence.

Judg-

Judgment by Default and Execution.

WHEN the Plaintiff has obtained a Rule for Judgment by Default, and the Defendant has not pleaded in the four running Days after such Rule, then the Plaintiff or his Attorney may apply to the Officer of the Court, and he will thereupon mark the Judgment upon the back of the Declaration.

Judgment by Default.

Then, if it be an Action of Debt, the Plaintiff may immediately at his Election have a *Capias ad Satisfaciendum* against the Body of the Defendant, or he may have a *Fieri facias* of the Goods and Chattles of the Debtor; or a Writ for the Sheriff to deliver him all the Chattels of the Debtor (except Oxen and Plough Beasts) and a Moiety of his Lands by a reasonable Extent, until the Debt be levied; and this last Writ is called an *Elegit*; but he cannot regularly take out two different Executions on the same Judgment, nor a second of the same Nature, unless upon Failure of Satisfaction on the first.

Execution by *Capias ad Satisfaciendum Fieri facias* and *Elegit*.

Two Executions not to issue on the same Judgment.

But the Plaintiff may upon the same Judgment let the Venue be laid where it will, issue as many *Elegits* to as many

Several *Elegits* to several Counties.

Judgment by Default, &c.

different Counties as he thinks fit, and may execute all, or any of them as he pleases.

After Elegit returned and filed, no other Execution to issue.

But note, if a Plaintiff first makes his Election to have an Elegit, he cannot afterwards have any other Execution, that is to say, if Lands be taken, (though but an Acre) and the Writ returned and filed. 1 *Lev.* 92.

Testatum, Capias ad Satis faciendum.

Fieri facias to the Coroners.

The Writs of *Capias ad Satisfaciendum* & *Fieri facias*, must be first directed to the Sheriff of that County only where the Venue is laid in the Declaration; but if the Plaintiff sues forth a *Capias ad Satisfaciendum*, and the Sheriff returns thereon that the Defendant is not to be found in his Bailiwick, then a *Testatum Capias ad Satisfaciendum* may be issued to the County where, the Defendant lives or resides; and if the same Return be made on the *Testatum Capias ad Satisfaciendum*, the Plaintiff may then have a *Fieri facias* directed to the Sheriff of the County in which the *Venue* is laid as aforesaid; and upon Return thereon of no Goods, &c., he may have a *Fieri facias* directed to all or any of the Coroners of the same County, or to the Sheriff of any other County: And so, *Vice Versa*, in Case the Defendant first chuses a Writ of *Fieri facias*; and upon either of these Writs, if the Plaintiff can get no Satisfaction he may afterwards have an Elegit.

But

But if the Plaintiff obtains Judgment by Default in an Action on the Case or of Covenant, Trover, &c. the Plaintiff cannot immediately issue Execution, as the Damages in such Actions are not certain, as they are in Actions of Debt; but he must first sue forth a Writ upon the Judgment directed to the Sheriff, commanding him to summon a Jury to enquire what Damages the Plaintiff hath sustained *Occasione praemissorum*: And this is a judicial Writ and is called a *Writ of Inquiry of Damages*.

Writ of Inquiry of Damages. in what Cases.

If the Venue in the Declaration be laid in the County of the City of *Dublin* or County of *Dublin*, in such Case, the Plaintiff or his Attorney must give the Defendant or his Attorney eight Days Notice of speeding such Writ of Inquiry, and of the Time, and Place, and before whom, exclusive of the Day of serving the Notice, and inclusive of the Day on which the Writ is to be sped, and also inclusive of Sundays and Holidays: And if such Writ of Inquiry is to be sped in the Country, in such Case, fourteen Days Notice must be given as aforesaid.

The Notice to be given of Speeding the same.

And when this Writ is returned with the Inquisition, the Plaintiff may then get Counsel to move thereon for Judgment, which the Court will grant unless Cause be shewn to the contrary in four

Judgment thereon.

four Days, after the Rule entered for that Purpose: And if no Cause be shewn in four sitting Days after such Motion, the Plaintiff's Attorney may then move on an attested Copy of the said Rule for Judgment absolute, and it shall be granted: and the Plaintiff may then issue Execution as is before directed in p. 167.

Execution.

In what Cases this Writ lies, and how it is to be executed.

This Writ lies on a *Nihil dicit, non sum Informatus*, or a *Demurrer*, that is to say in Actions of *Trespasses, Covenant*, or on the *Case*, &c. but it never lies in an Action of *Debt*, as in it the Damages are certain; nor upon a Verdict; and it is executed before the Sheriff, or his Deputy where both Parties have the Liberty of being heard by their Counsel or Attornies; and Evidence may be given on both Sides; for, it is the Duty of the Jury, to inquire what Damages have been sustained by the Plaintiff, and this cannot be without Evidence given them. And if where an *Indebitatus Assumpsit* is brought for 100*l.* for Goods sold and delivered, and the Defendant lets this go by Default, if the Plaintiff at the executing the Writ of Inquiry, gives no Evidence to the Jury of any Goods sold or delivered to the Defendant, in this Case the Jury must find some Damages, because the Defendant hath confessed the Action, and admitted that there is Damage; but there being not any proved

The Jury must find some Damages.

ed they ought to find only a Penny,
or some such small Matter. 2 *Lill. Abr.*
721; 722.

If a Writ of Inquiry be executed without giving due Notice to the Defendant, it shall be quashed. 2 *Lill.* 721. For what it shall be quashed.

A Writ of Inquiry was ordered to be executed before the Lord Chief Justice, the Action being laid for very large Damages. And this Writ hath been set aside where the Jury gave too little Damages, and a new Writ of Inquiry ordered by Rule of Court, on Payment of Costs, &c. *Mod. Case in Law and Equity*, 213, 240. Hath been executed before the Chief Justice.

May be set aside for too small Damages.

A Judgment shall not be set aside after a Writ of Inquiry executed. 3 *Salk.* 400. *Paget against Preston.* Judgment not to be set aside after a Writ of Inquiry executed.

Ordered by the Court for the future, that where the Plaintiff hath a Rule for Judgment and lies by above a Year and a Day without proceeding thereon, he shall not be at Liberty to move another Rule for Judgment unless an Affidavit be filed that the Parties in such Action are alive, and that the Debt or Demand still subsists. 23d Jan. 1727.
RULE.
Where Plaintiff lies by above a Year and a Day after Rule for Judgment.

Habeas

Habeas Corpus cum causa, & Procedendo.

*Habeas Corpus
cum causa.*

THE Writ of *Habeas Corpus cum causa*, is a Writ that lies for the Removing of the Body of the Party to whom granted and all the Causes depending against him out of an inferior to some superior Court, who may imagine himself injured by the Proceedings of such inferior Court. And if upon the Return thereof the Officer doth not return all the Causes, &c. it is an Escape in him. 2 *Lill. Abr.* 2. See other Cases in which this Writ issues, p. 56, &c. Title *Capias Quominus*, &c.

The Effect of
this Writ.

This Writ suspends the Power of the inferior Court, so that if they proceed after the Delivery of it, the Proceedings are void, and *Coramnon Judice*; for the Person of the Defendant being removed to the superior Court, they have lost their Jurisdiction over him, and all the Proceedings in the superior Court are *de novo*, and Bail *de novo* must be put in in the superior Court. 3 *Bacon* 15.

All the Proceedings in the superior Court to be *de Novo*.

Bail to be given
on the *Habeas
Corp.*

And on this Writ, the Party must file special Bail in the Court above, altho' the Plaintiff's Demand be under 10*l.* if in the inferior Court special Bail was requisite, (unless the Defendant be an Executor, or Administrator, for then no special Bail is required above) that the

the Plaintiff may not be in a worse Condition than he was in, in the Court below.

The *Habeas Corpus cum causa* is to be signed by the Chief Baron; and if it issues in Term Time, it is usually made returnable at a Day certain in Court: but if it issues in Vacation, it is returnable *immediate* before one of the Barons at his House or Chambers, that is to say, if the Defendant be imprisoned; but if it be only to remove the Cause, and that the Body is not imprisoned, then it is usually made returnable the first Day of the next ensuing Term; and at the same Time, there also issues a Warrant signed by the Chief Baron and directed to the Clerk of the Pleas Office of this Court, empowering him to issue such Writ of *Habeas Corpus cum causa*, and this Warrant is tacked to the Writ. And great Care must be taken in the Direction of this Writ as to the Style and Title of the inferior Court; but as this Writ is always made out in the Office of Pleas, and not by the Attorney, the Officer takes care to direct it properly.

How made returnable where the Defendant is, and where he is not imprisoned.

Warrant for suing it.

When the Defendant is arrested by Process from an inferior Court and imprisoned, and brings a Writ of *Habeas Corpus cum causa* in Term Time returnable before the Barons, in such Case, upon the Return of the Writ, if the Defendant cannot give Bail here to every Action that is returned to be depending

Habeas Corpus in Term where the Defendant is imprisoned, and the Proceedings.

pending against him in the inferior Court from whence he is removed, the Officer of this Court will enter separate Rules in the Court Book for committing him upon every one of the Actions which are so returned to which the Defendant cannot give Bail.

The like where the Defendant is not imprisoned.

But where a Defendant is not imprisoned, and he brings a Writ of *Habeas Corpus cum causa* returnable as aforesaid, the Plaintiff's Attorney may, when the Return of the said Writ is out, apply for the same to the Officer of the inferior Court, and may thereupon immediately move the Court above that the Defendant may give Bail in four Days or that a Writ of *Procedendo* may be awarded to remand the Cause to the inferior Court; and thereupon, the Court will grant a Rule for that Purpose without further Motion, or without Service of the Defendant therewith. But if the *Habeas Corpus cum causa* be returned and filed, the Plaintiff must then move upon an attested Copy of the Writ and Return.

Procedendo.

Habeas Corpus in Vacation where Defendant is imprisoned, and the Proceedings.

If the Defendant be arrested by Process from an inferior Court, and is imprisoned as aforesaid; if it be in Vacation Time, and he brings a Writ of *Habeas Corpus cum causa* returnable *immediate* before one of the Barons, in such Case, the Defendant is to get the Marshal of the Four Courts to attend with

with him at the Baron's House before whom it is returnable; and if he has not Bail, then the Baron will commit him to the Custody of the Marshal; and when the Defendant is so committed, the Marshal is to bring back the Writ of *Habeas Corpus cum causa* to the Office of Pleas, and thereupon the Officer enters the Rule for committing the Defendant upon that Action, and upon every other Action which is returned by the inferior Court as aforesaid.

But where the Defendant is not imprisoned, and he brings a Writ of *Habeas Corpus cum causa* in Vacation Time to remove the Cause into this Court, in such Case, all Proceedings in the inferior Court are to stop until the Term following; but the Plaintiff's Attorney may upon the first Day of the next ensuing Term, move the Court for the Defendant to give Bail in four Days, or that a *Procedendo* may issue, and it will be granted as aforesaid; and such Motion may be made by the several Plaintiffs in the several other Actions which are returned by the inferior Court to be depending therein against the Defendant.

The like where the Defendant is not imprisoned.

Procedendo.

Where a Defendant is so committed upon several Actions to the Marshal of the Four-Courts upon a Writ of *Habeas Corpus cum causa*, the Power of the inferior Court is suspended as to every one of

When Defendant is committed the Power of the inferior Court is suspended.

of them Causes, and all the Proceedings in the superior Court upon each of them must be *de novo*; and the Plaintiff must declare against the Defendant in Custody of the Marshal of the Marshalsea of the Four Courts. 1. *Salk.* 352.

The Steward or Judge of the inferior Court refusing or delaying to return the Writ may be fined.

If any Steward, Judge, or Judges, or other Officer, or Officers of the Courts wherein, or to whom, any such Writs of *Habeas Corpus cum causa* shall be directed and delivered, shall refuse, or delay to return the same in proper Time, you may proceed to fine them in like Manner as is before directed for the fining of Sheriffs for not returning Writs.

And may be attached if they proceed after the Writ is delivered upon Affidavit.

And if any inferior Court shall proceed after the Writ of *Habeas Corpus* is delivered, such Proceedings are void. And the superior Court upon an Affidavit of such Proceedings, and upon Council's Motion, will award a *Superfedeas*, and will grant an Attachment against the Steward, Judge or Judges, or other Officer or Officers of such inferior Court for the Contempt. *Cro. Car.* 79. 296.

Where a Cause is removed by *Habeas Corpus*, Defendant cannot move for a *non pros* 'till he gives Bail.

Where a Defendant is arrested upon an Action from an inferior Court, and gives Bail thereto in the Court below, and after brings a Writ of *Habeas Corpus cum causa*, and the Plaintiff neglects to put a Rule upon the Defendant to give Bail as aforesaid, and the Defendant doth not give Bail, the Defendant cannot in this Case move

move for a *non prosecut* against the Plaintiff for not proceeding, for he is not deemed to be in Court until he gives Bail upon the *Habeas Corpus*. But the Defendant may give Bail without the Plaintiff's putting a Rule on him for that Purpose; and the Plaintiff is to declare against the Defendant in four sitting Days after the Bail is given, or the Defendant may obtain a *non Pros* against him in such Manner as is herein before directed in Title *Declaration*.

By 9 *Will.* 3 ch. 38. It is enacted, that no *Habeas Corpus*, or *Certiorari*, or other Writs (other than Writs of Error or Attaint) to be sued forth by any Person, out of any of the King's Courts at *Dublin*, or out of any other Courts having Power to award such Writs, to stay or remove any Action, Bill, Plaint, Suit, or Cause to be commenced or depending in any Court of Record, within any City, Liberty, Town corporate, or elsewhere, having Power to hold Plea therein, and the same Cause of Action, &c. arising within the said City, &c. shall be received or allowed by the Steward, Judge, or Judges, or Officer, or Officers of the Courts, wherein or to whom any such Writs shall be directed, and delivered, but that they proceed as though no such Writs were sued forth, or delivered, except the same be delivered before Issue or Demurrer joined in the said Causes, so as the same be not joined

Habeas Corpus
what Time to
be delivered to
the inferior
Court.

Habeas Corpus, &c.

in six Weeks, next after the Arrest or Appearance of the Defendant to such Action or Suit commenced.

Cause remanded by *Procedendo*, not to be afterwards removed before Judgment.

And if any Action, &c. commenced or depending in any such Court, be removed or stayed by any such Writs, and afterwards shall be remanded by *Procedendo*, or other Writ, then the said Action shall never afterwards be removed or stayed before Judgment, by any Writs to be sued out of the Courts of *Dublin*, or any other Court as aforesaid.

Action under § 1. not to be removed.

And if any Action, &c. (not concerning Freehold or Inheritance, or Title of Land, Lease, or Rent) shall be commenced or depending in any such Court of Record, if it shall appear, or be laid in the Declaration, that the Debt, Damages, or Thing demanded does not amount to, or exceed the Sum of five Pounds, then the same shall not be stayed, or removed into any of the Courts aforesaid by any Writs, other, than by Writs of *Error* or *Attaint*.

And if any Writs shall be sued out of any of the said Courts contrary to the Meaning of this Act, the Judges or Officers to whom they shall be delivered, may refuse the same, and proceed as if no such Writ had been sued out as aforesaid.

Not-

Notwithstanding that by the afore-
 said Act a *Habeas Corpus cum causa* may
 not be received or allowed by the in-
 ferior Court except the same be deli-
 vered before Issue or Demurrer joined,
 so as the same be not joined in six Weeks
 next after the Arrest, or Appearance of
 the Defendant, yet it is daily practised
 otherwise; and the Court below will
 receive a *Habeas Corpus* at any Time
 before Trial, so that it be tendered to
 the Steward, Judge, or Officer of the
 Court, before any of the Jury are
 sworn; however it is thought, that the
 Court above would upon Application
 of the Plaintiff Remand the Action.

Habeas Corpus re-
 ceived at any
 time before Tri-
 al.

And by the said Act, if the Action
 be under 5*l.* the Cause is not to be re-
 moved from the inferior Court, but is
 to be tried there; yet notwithstanding
 this Act, the Inferior Court, when they
 receive a *Habeas Corpus cum causa* usu-
 ally return the same with the Action
 to the Court above, altho' it be under
 5*l.* but the Court above will, upon Mo-
 tion of the Plaintiff's Attorney, re-
 mand the same to the inferior Court
Instante:

Action under 5*l.*
 not to be remov-
 ed.

If upon a *Habeas Corpus cum causa*,
 the Plaintiff shall prevail in the Court
 above, he shall be paid his Costs in the
 Plaint in the inferior Court, so far as

If Plaintiff or
 Defendant pre-
 vails in the Court
 above, he is to
 be paid the Costs
 incurred in the
 inferior Court.

the same was prosecuted. *Et sic e converso* as to the Defendant.

18th Jan. 1687.

RULE.

Pauper not admitted to sue forth a *Habeas Corpus cum causa*, but on Affidavit of his tendering Bail in the inferior Court, and it's being refused.
Sed Vide post.

Ordered, that for the future, no Person being a Defendant in any inferior Court, shall be admitted in *Forma pauperis* to sue forth any Writ of *Habeas Corpus* to remove any Action there depending into this Court, before Affidavit be made and filed of Record in the Pleas Office of this Court, of such Defendant's tendering Bail in the inferior Court, and of the Judges, Seneschal, or Officers of such inferior Court Refusal of accepting of such Bail tendered for the Defendant. *Sed vide post.*

17th Nov. 1688.

RULE.

Habeas Corpus cum causa not to issue for *Paupers*.

It is ordered for the future, that no Writ of *Habeas Corpus cum causa* do issue for the removing of any Action from any inferior Court, into this Court, for any Defendant in *forma Pauperis*; and that no Defendant be admitted for the future to sue forth any such Writ of *Habeas Corpus cum causa*. *Mod. Rep.* 268.

Habeas Corpus to remove a Person in Execution, reasonable Expenses to be lodged in the hands of the Sheriff.

Where a Person is in Execution (by Virtue of a *Capias ad Satisfaciendum* issued out of this Court, or any other Court) in any County Gaol, and is minded to remove his Body to the Marshalsea of the Four Courts, he may do it by this Writ; and in such Case, the Defendant shall deposite some reasonable Sum in the Hands of the Sheriff or other

other Officer, in whose Custody or Prison he is, to defray the Expence of such Removal.

By 8 Geo. 1 ch. 6 *pars.* It is enacted, that no Officer to whom any *Habeas Corpus* taken out in behalf of the Defendant shall be directed, shall be obliged to remove the Body of such Defendant being in Custody on any Execution on a Judgment in a civil Action, until he shall deposite such Sum to defray the Expences of the said Removal, as the Court or Judge who grants the said *Habeas Corpus* shall think proper.

No Officer obliged to remove the Body of any Prisoner in Execution but upon such Sum being deposited as the Court shall think proper to defray the Expences.

A *Procedendo* is a Writ that goes to the Court from whence the Cause is removed by *Habeas Corpus*, on its appearing, that there is no Cause for it, &c. to proceed *non obstante* the *Habeas Corpus*: It Ends with these Words (to wit,) *That you proceed with Effect notwithstanding any Writ to you lately directed to the contrary, &c.*

Procedendo what.

If the Defendant hath put in Bail in this Court on Removal of the Cause hither by *Habeas Corpus*, and afterwards the Bail is disallowed by the Court, if the Defendant does not forthwith put in better Bail, and such as shall be approved of, the Plaintiff's Attorney may upon

A *Procedendo* if sufficient Bail be not given on a *Habeas Corpus*.

Motion, obtain a Rule for a *Procedendo* without further Motion, unless Bail be given in four Days after such Rule ; for until the Bail is allowed, the Court is not possessed of the Cause so as to proceed : But after Bail is allowed, a *Procedendo* ought not to be granted, for, by accepting the Bail the Plaintiff admits of the Jurisdiction of the Court, and then it is too late to move for a *Procedendo*. *Pract. Attor.* 3d Ed. 244.

No *Procedendo*.
after Bail is al-
lowed.

RULE.
19th Nov. 1681
Upon *Habeas*
Corpus returnable
immediately be-
fore one of the
Barons in Vac-
ation, *Procedendo*
to issue if no
Bail in 8 Days.

Ordered by the Court, that Writs of *Procedendo* do issue of course without Motion for the Plaintiff, in any Vacation, upon all Writs of *Habeas Corpus cum causa*, returnable immediately before any of the Barons of this Court, if the Parties Defendants in any such Writs of *Habeas Corpus cum causa* do not within eight Days next after the issuing of such Writs of *Habeas Corpus cum causa*, enter Bail *de adjudatis solvendis* thereof, before one of the Barons of this Court ; and after such *Procedendo* granted, no other or new *Habeas Corpus* is to be granted in such Cases out of this Court. See *Declarations against Prisoners*, pa. 105. and *Executions*.

Tryal.

Trial.

LORD Coke in his 1st Book of the Institutes, 125 says that Trial is, to find out by due Examination the Truth of the Point in Issue or Question between the Parties whereupon Judgment may be given. And as the Question between the Parties is two fold, so is the Trial thereof; for either it is *Questio Juris* (and that shall be tried by the Judges either upon a Demurrer, special Verdict, or Exception, for *Cuilibet in Sua Arte perito est Credendum, et quod quisque norit, in hoc se Exerceat*, and it is commonly and truly said *ad quaestionem Juris non respondent Juratores*) or it is *Questio facti*; and the Trial of the Fact is in divers Sorts (whereof see the same Book, Sect. 102) of these a Trial by twelve Men is the most frequent and common. And here it is to be observed, that the Jury is to come from the proper Place, and to be returned by the proper Officer for if the Jury come out of a wrong Place, or be returned by a wrong Officer, and give a Verdict, Judgment ought not to be given on such a Verdict. The most general Rule has been, that every Trial shall be out of that Town, &c. within the Record, within which the Matter of Fact issuable is alleged, which is most certain and

Trial a Definition of it.

Trial two fold
Questio Juris and
Questio facti.

The Jury to come from the proper place and to be returned by the proper Officer.

neareſt thereunto, the Inhabitants where-
of may have the better and more cer-
tain Knowledge of the Fact.

The Trial by 12
Men in ſeveral
different Ways.

And this Trial by twelve Men may
be in ſeveral different Ways; by *Nifi
prius*, at Bar, by *proviſo per Medietatem
Linguae*, and by leading Order.

And 1st, Of the Trial by Nifi prius.

Trial by *Nifi
prius*.

Before I ſet forth the Practice and Pro-
ceedings upon Trials by *Nifi prius*,
it may not be amiſs, for the better Under-
ſtanding thereof, firſt to give ſome ſhort
Account of the Original, and the Rea-
ſon of the Inſtitution of this Trial, and
from whence it has derived its preſent
Name.

Nifi prius, what.

Nifi prius, is a Writ or Commiſſion
to Juſtices of *Nifi prius*, by virtue where-
of all Pleas in the Country are deter-
mined before Juſtices of Aſſize, and is ſo
called from a judicial Writ of *Diſtringas*,
whereby the Sheriff is commanded to
diſtrain the impannelled Jury to ap-
pear at *Weſtminſter* before the Juſtices,
at a certain Day in the following Term,
to try ſome Cauſe, *Nifi prius Juſtic. Do-
mini Regis ad Aſſiſas Capiend. venerint*,
viz. unleſs the Juſtices come before that
Day to ſuch a Place, &c. 2 *Inſt.* 424.
4 *Inſt.* 159. 2 *Lill.* 215.

And

And when the *Nisi prius* is made up and sealed, it is also called the Record of *Nisi prius*, and it ought to contain a Transcript of the whole Issue Roll.

The Record of *Nisi Prius* to contain the whole Issue Roll.

And this Writ or Commission of *Nisi prius* was first given by the Statute of *Westminster*, 2. 13 Ed. 1. ch. 30. and was ordained for the Ease of the Country, the Parties, Jurors, and Witnesses, by saving them the Charge and Trouble of coming to *Westminster*. But in Matters of great Weight and Difficulty, the Judges above, upon Motion and Information, will often retain Causes to be tried there tho' laid in the Country; and the Jury and Witnesses in such Cases, must come up to the Courts at *Westminster* for Trial at Bar. *Wood's Inst.* 479.

Trials by *Nisi Prius* at the Assizes when first given.

Trial at Bar.

As the King is not expressly named in the said Statute, and it is a general Rule that he shall not be bound except named, it is said, where the King is Party, a *Nisi prius* ought not to be granted without his special Warrant, or the Assent of his Attorney, tho' the Court may grant it in Appeals, in the same manner as in any other Actions. 2 *Inst.* 424. 4 *Inst.* 160. *Dyer* 46. 2 *Hawk.* P. C. 411.

Nisi Prius not granted where the King is Party without his special Warrant, or the assent of his Attorney.

It is enacted by 17 and 18 Ch. 2. ch. 20. That the Chief Justice of the King's Bench, upon Issues to be joined

Trial by *Nisi Prius* of Issues laid in the City of Dublin and County of Dublin.

in that Court, or in the Chancery, the Chief Justice of the Common Pleas, upon Issues to be joined there, and Chief Baron upon Issues to be joined in the Exchequer, or in the Absence of any of them, one or more of the other Judges or Barons of the same several Courts (where the Chief Justices or Chief Baron are absent) may at their Discretion, within the said Place where the said said Courts are commonly kept, in the City, or County of *Dublin*, as Justices of *Nisi prius* for the said City and County, within the Term Time, or within four Days next after any Term, severally try, all Manner of Issues to be joined in any of the said several Courts, which by Law ought to be tried in any of them, by an Inquest of the said City, or County of *Dublin*, and Writs of *Nisi prius* shall be awarded in such Cases, and in such Form as they are used in any other Shire of this Realm.

Nisi Prius.

And, all Persons (upon reasonable Warning, given to the adverse Party, or his or their Attorney, as has been used in such like Cases) may sue forth Writs and Records of *Nisi prius* for the Trials of the said Issues in the said City and County of *Dublin*, as they may do upon any Issue joined, triable in any other County, and take a Jury in such Manner and Form, and with awarding *Tales de circumstantibus* and *non Suit*, as is used for the Trials of Issue joined,
or

Tales de circum-
stantibus.

or *non Suits* to be awarded in the said *Non Suit*.
Courts, triable in any other County
within this Realm.

And the Sheriffs of the City of *Dublin*, and the Sheriff of the County of *Dublin* shall respectively make Return of all Writs of *Nisi prius*, which shall be delivered to them or their Deputies before the said Judges or Barons; and shall give their Attendance upon them, as well for the returning of such Tales (as shall be prayed) *de circumstantibus* for the trying of the said Issues, as for the doing and executing every Thing to their Office in such Case belonging.

Sheriff to return
Writs of *Nisi
Prius* before the
Barons, &c.
and to give their
attendance.

Tales *de circum-
stantibus*.

And all Persons to be impannelled in such Juries, and the Parties to the same Issues and Suits, and their Witnesses shall be bound in the like Sort, and upon like Penalties for their non Appearance, and Attendance, or for any of their Misdemeanours or Defaults before any of the said Justices of *Nisi prius*, as they should have been, if the same Issue had been tried in the Court from whence the *Nisi prius* was awarded.

Like Penalties on
the Parties Wit-
nesses and Jurors
for Defaults and
non attendance
as on Trials at
Bar.

All which said several Trials so to be had before the said Justices, Baron, or Barons, shall be as good in Law, as if the same had been tried in the Term Time, at the Bar in the Court where such Issue was joined or triable.

Trials by *Nisi
Prius* to be as
good in Law as
Trials at Bar.

It

Nisi Prius before
the Puisne Ba-
rons and Kings
Council.

It is enacted, by 8 Geo. ch. 6. That Writs of Assize and *Nisi prius* may be executed before the Puisne Barons of the Exchequer, or either of them, or before the Prime Serjeant, Attorney, or Solicitor General, or any of them, or any of the King's Council at Law, and they, or any of them may be Commissioners of *Oyer and Terminer*, and Gaol Delivery, and shall have the same Power as the Justices of one Bench or the other have in the Execution of such Writs or Commissions in any County when so appointed.

For several old Statutes relating to *Nisi prius*. See *Robin's Abridgement*, Title *Nisi prius*.

*The Practice and Proceedings upon Trials
by Nisi prius with the several Statutes
relative thereto.*

Notice of Trial
at Dublin and
at the Assizes.

WHEN the Defendant has pleaded to the Plaintiff's Declaration, and Issue is joined, then, if the Venue is laid in the County of the City, or in the County of *Dublin*, the Defendant's Attorney is to have eight Days Notice of trying the Cause by *Nisi prius*, in one of the three sitting Days in Term, appointed for trying Causes by *Nisi prius* or in the one sitting Day after Term,
ex-

exclusive of the Day of serving the Notice and the Day of Trial, and these four Days so allotted for hearing Causes by *Nisi Prius* are posted up in the Pleas Office of this Court; but if the Trial be by *Nisi Prius* at the Assizes, then the Defendant's Attorney is to have fourteen Days notice thereof exclusive as aforesaid. But if a Cause has continued four Terms without Prosecution, a Term's Notice is to be had of Trial, &c.

And now it is to be observed, that heretofore the Proceedings were, in the General, the same upon all Trials by *Nisi Prius*, as well where the *Venue* was laid in the County at large, as where it was laid in the County of a City or the County of a Town, but of late the Proceedings upon Trials in Counties have been greatly altered by several Acts of Parliament, wherefore, I believe it will be proper to treat seperately of these Matters; but as the Law still remains pretty much the same it always was on such Trials in Counties of Cities and Counties of Towns, I shall therefore first treat of the Proceedings upon these Trials; besides, the Statutes are but temporary.

The Proceedings formerly the same upon Trials in Counties of Cities and Counties of Towns, but of late much altered in the former.

And accordingly, where the *Venue* is so laid in the County of a City or County of a Town, and that the Plaintiff hath given Notice of Trial as is before directed he is then to issue a *Venire facias Furator*. And by this Writ the Sheriff is com-

And ist the Proceedings on Trials in Counties of Cities and Counties of Towns.

Nisi Prius before
the Puisne Barons
and Kings
Council.

It is enacted, by 8 Geo. ch. 6. That Writs of Assize and *Nisi prius* may be executed before the Puisne Barons of the Exchequer, or either of them, or before the Prime Serjeant, Attorney, or Solicitor General, or any of them, or any of the King's Council at Law, and they, or any of them may be Commissioners of Oyer and Terminer, and Gaol Delivery, and shall have the same Power as the Justices of one Bench or the other have in the Execution of such Writs or Commissions in any County when so appointed.

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ex-

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The Proceedings formerly the same upon Trials in Counties of Cities and Counties of Towns, but of late much altered in the former.

And accordingly, where the *Venue* is so laid in the County of a City or County of a Town, and that the Plaintiff hath given Notice of Trial as is before directed he is then to issue a *Venire facias Furrator*. And by this Writ the Sheriff is com-

And ist the Proceedings on Trials in Counties of Cities and Counties of Towns.

The Qualification of the Jurors.

commanded to return on a certain Day specified therein, twelve free and lawful Men of the * Body of his County (every one of which to have forty Shillings a Year at least of Lands Tenements or Rents) by whom the Truth of the Matter will be better known, and who are in no wise related either to the Plaintiff or Defendant, &c. And the Names of the Jurors are to be inserted in a Panel which the Sheriff returns with the Writ, and in this Panel there must be 24 at least, See 10 Ch. 1st. ch. 13. and 6 Ann. ch. 10.

The Form of the Distringas upon such Trials.

And when the Sheriff has returned the *Venire facias*, then issues a *Distringas Juratores* thereon, and in the Body of this Writ, are inserted the Names of the Jurors, specified in the Panel annexed to the *Venire*, and the Sheriff is thereby commanded, *To distrain the said Jurors by all their Lands and Chattels in his Bailiwick, &c. And to have their Bodies before the Barons of this Court on the Day of Nisi Prius, &c.*

* By the Statute 10 Cha. ch. 13. in every Panel upon every *Venire facias* the Sheriff was obliged to return two sufficient Hendredors at least, if there so many within the Barony or hundred where the *Venne* lay, but now, by the Statute 6. Ann. ch. 10. the *Venire facias* is to be awarded of the Body of the proper County except in the Cases mentioned in the said Statute.

And

And by the Statute 10. *Cha. 1. ch. 13. Sect. 2.* Upon every first Writ of *Habeas Corpora* or *Disstringas* with a *Nisi Prius* delivered to the Sheriff, &c. the Sheriff shall return in Issues upon every Person impanelled at the least five Shillings, and at the second Writ of *Habeas Corpora* or *Disstringas* with a Writ of *Nisi Prius* upon every Person impanelled ten Shillings at the least, and at the third Writ of *Habeas Corpora* or *Disstringas* with a *Nisi Prius* that shall be further awarded, upon every Person impanelled thirteen Shillings and four Pence, and upon every Writ further awarded to double the Issues last afore specified, until a full Jury be sworn, or the Process otherwise determined, upon Pain to forfeit for every Return contrary to the Form aforesaid five Pounds.

The Issues to be returned by the Sheriff upon the Jurors who make Default, and the Penalty for not returning them.

And by Sect 3. In every such *Habeas Corpora* or *Disstringas* with a *Nisi Prius*, where a full Jury shall not appear before the Justices of Assizes or *Nisi Prius*, or else after Appearance of a full Jury by Challenge of any of the Parties the Jury is like to remain untaken for Default of Jurors, the same Justices upon Request made by the Plaintiff or Demandant, or by him that maketh Cognizance or Avowry in Replevin, or by the Tenant or Defendant, shall have Authority to command the Sheriff, &c. by the Nomination of the Justices of Assizes to impan-

The Sheriff to return a Tales where a full Jury do not appear.

impanel so many able Persons of the said County then present at the said Assizes or *Nisi Prius*, as shall make up a full Jury, which Persons to be named and impanelled shall be added to the former Panel, and their Names annexed to the same.

And the Parties may have their Challenges to the Tales.

And by Sect. 4. the Parties shall have their Challenge to the Jurors so added to the former Panel as if they had been impanelled upon the *Venire facias* awarded to try the Issue; and the said Justices shall proceed to the Trial of such Issue with those Persons that were impanelled, and those newly added to the former Panel, in such wise as they ought to have done if all the said Jurors had been returned upon the Writ of *Venire facias* awarded to try the said Issue.

The Court may fine Persons present for not appearing on the Tales.

And by Sect. 5. in case such Persons as shall be named as is aforesaid after they be called be present and do not appear, or after their Appearance do willfully withdraw themselves from the Court, such Justices shall set such Fine upon every Juror making Default, or willfully withdrawing himself as they shall think good by their Discretion, the said Fine to be levied in such Manner, as the Issues forfeited by Jurors by Default of their Appearance at the common Law have been accustomed to be levied.

And

And by Sect. 6. where any Jury returned by the Sheriff, &c. shall be made full by the Command of the Justices by Virtue of this Act, such Persons as were returned in the Pannel, that shall make Default, shall lose the Issues upon them returned, as though the Jurors had remained for Default of Jurors.

And the Jurors who make default to lose their Issues.

And by Sect. 7. upon a reasonable excuse for the Default of Appearance of any Juror sufficiently proved before the Justices of Assize or *Nisi prius*, at the Day of their Appearance, by the Oath of one lawful Witness, the Justices shall by their Discretion Discharge such Juror of such Forfeiture of Issues upon him returned, and the Sheriff shall be therein discharged of the Penalties aforesaid for the non returning of the said Issues.

A Juror may be excused upon a reasonable Excuse.

And by Sect. 8. if the Assize or *Nisi prius* shall be discontinued for the not coming of the Justices or any other Occasion other than by Default of Jurors, every one of the same Jurors shall be discharged forfeiting of any Issue upon him returned in the Writ, and the Sheriff, &c. shall be likewise discharged of the Penalty of this Statute for the not returning of such Issues.

Or if the Justices come not at the day.

Penalty on Sheriffs, &c. returning Issues upon Jurors not summoned.

And by Sect. 9. if upon any Writ of *Habeas corpora* or *Distringas* with a *Nisi prius*, Issues be returned upon any Hundredors, or Jurors, whereas the same Hundredors and Jurors shall not be lawfully summoned, every Sheriff, &c. shall lose double so much as the said Issues returned upon such Hundredors or Jurors shall amount unto, the Moiety of all which Forfeitures contained in this Act, other than the Issues to be returned upon the Jurors, shall be to the King, and the other half to him that will sue for the same by Action, &c. in any Court of Record in which no Effoien, &c. shall be allowed, saving to all Persons all such Right as they would have had to such Issues as though this Act had never been made.

Not to extend to Sheriffs or Corporations making Returns.

And by Sect. 10. this Act shall not extend to any City, or Town corporate, or to any Sheriff or Ministers in the same, in the Return of any Inquest or Panel to be made of Persons inhabiting in the said Cities, or Towns corporate, but that they may return such Persons, as they shall be accustomed to do, so that the Sheriff, &c. return upon such Persons as have been impanelled, like Issues as are before mentioned in this Act.

And

And by the aforesaid Statute 6 *Ann.* ch. 10. if it appears to the Court that it will be necessary that the Jurors who are to try the Issue, should have a View of the Place in Question in order to their better Understanding the Evidence to be given upon the Trials of such Issues, in every such Case, the Court may Order a special Writ of *Distingas* to issue, by which, the Officer to whom the Writ was directed, shall be commanded to have six out of the first twelve of the Jurors named in such Writ, or some greater Number of them at the Place in Question, some convenient Time before the Trial, who shall have the Matter in Question shewn to them by two Persons named in such Writ, to be appointed by the Court, and the Officer who is to execute the said Writ shall by a special Return on the same certify that the View had been had according to the Command of the Writ.

The Method of
a View on such
Trials.

And by Statute 12 *Geo. 1* ch. 4. the Sheriffs of each County shall at their *Michaelmas* grand Turn yearly, in every Barony in their several Counties diligently enquire by the Oaths of twelve or more honest Men, and make a true Return of all the Freeholders having Freehold Lands of Forty Shillings, *per Ann.* or more of each Barony, together with the Name and Sir-Name of every such

Sheriffs to return
a List of all Free-
holders in the
County to *Janu-*
ary Sessions, to
be delivered to
the Clerk of the
Peace and he to
transmit a Copy
thereof to each
of the Four
Courts.

Freeholder, with their Additions, and shall return the same on Oath signed by him at every *January Quarter-Sessions* of the Peace to the Justices, to be deposited by them in the Hands of the Clerk of the Peace or his Deputy yearly: And the Clerk of the Peace of each County, or his Deputy shall transmit a true Copy thereof signed by him into each of his Majesty's Four Courts at *Dublin*. And in Case any Sheriff, Sub-Sheriff, or Clerk of the Peace, or his Deputy shall neglect to do their Duty therein, such Sheriff, Sub-Sheriff, or Clerk of the Peace, or his Deputy shall for every such Neglect forfeit to his Majesty five Pounds, to be recovered in a summary Way before the Justices or Judges of that Court to which such Return ought to have been made.

2dly. *Of Trials by Nisi prius in Counties at large.*

Of Trials by
Nisi prius in
Counties at
large,

And thus the Law stood upon the Trial of every Issue, as well in Counties, as in Counties of Towns, and Counties of Cities, but it being found that many evil Practices had been used in corrupting of Jurors returned for the Trial of Issues joined, to be tried before the Justices of Assize or *Nisi prius*, and many Persons being lawfully summoned to serve on Juries having neglected to appear, to the great Injury of many Persons in their Property and Estates, for
Re-

Remedy thereof a late Statute was made in the ninth Year of his present Majesty's Reign, by which Statute, if the *Venue* be in the County of *Dublin*, or in any other County (for it extends not to Counties of Cities or Counties of Towns, nor to any Trials but before Justices of Assize or *Nisi prius*) the Law is greatly altered as to the Form of the *Venire* and *Distingas*, and also as to the Qualification and Number of the Jurors, and the Manner of returning them; which Act being Temporary was with several others relative to Juries which were also temporary suffered to expire in the extraordinary troubled Sessions of 1753, but were afterwards renewed and reduced into one with some small Alterations in the 29th Year of his present Majesty.

By Stat. 29 Geo. 2. Cap. 6. Sect. 1. From the first Day of *May*, 1756, no Person (other than Strangers, upon Trials, *per medietatem linguae*) shall be qualified to serve as Jurors, for the Trial of Issues between Party and Party, in the Courts of *Chancery*, *King's-Benchs Common-Pleas*, or *Exchequer*, or to serve on any Jury, on the Trial of any such Issue, before Justices of Assize, or *Nisi prius* (except in Counties of Cities and Towns) that shall not be seized of a Freehold of the clear yearly Value of ten Pounds, or being Protestants, shall not be possessed of Leases for a Term of Years, of which fifteen Years shall be then unexpired

The Qualification of Jurors upon Trials in Counties.

pired, or Leafes for sixty-one Years or more, determinable on one or more Lives, on which a clear profit Rent of not leſs than fifteen Pounds, ſhall accrue to the Leſſee: And if any Perſon of leſſer Eſtate or Value than as aforeſaid, ſhall be returned upon any ſuch Jury, it ſhall be a good Cauſe of Challenge, and the Party ſo returned, ſhall be diſcharged upon ſuch Challenge, on due Proof thereof, or on Oath by him to be made of the Truth of ſuch Matter; and the Writ of *Venire facias*, which from the Time aforeſaid, ſhall be awarded for impanelling of Juries, in Caſes aforeſaid, ſhall be in this Form: *K I N G*, and ſo forth. *We command, and ſo forth, that you cauſe to come before, and ſo forth, twelve free and lawful Men of your County, every of which to have ten Pounds a Year, at leaſt, in Lands, Tenements, or Rents, by whom, and ſo forth, and who are in no Ways, and ſo forth; and the Reſidue of the ſaid Writ ſhall be after the uſual Manner. And upon ſuch Writ, all Perſons qualified by this Act to ſerve on Juries, as is before directed, whether Freeholders or Leaſeholders, may be returned, ſummoned, and impanelled, by Virtue of this Act, or any other Acts for that Purpoſe.*

The Form of the
Venire facias.

Penalty on Sheriffs, &c. taking Rewards from Perſons to excuſe them from ſerving on Juries.

And by *ſect. 2.* No Sheriff or Under-Sheriff, Bailiff, or other Officer, or Perſon, ſhall take or receive any Reward

ward to excuse any Person from serving or being summoned to serve on Juries, or under that Colour, or Pretence; and no Bailiff or other Officer appointed by any Sheriff or Under-Sheriff to summon Juries, shall summon any Person to serve thereon, other than such whose Name is specified in a Mandate signed by such Sheriff or Under-Sheriff, and directed to such Bailiff or other Officer, but shall summon every Person named in such Mandate, by the Space of six Days at least, before the Time appointed for such Jury to appear; and if any Sheriff, Under-Sheriff, Bailiff or other Officer, shall wilfully transgress in any of the Cases aforesaid, any Court where such Jury is to appear, the Judge or Justices of Assize or *Nisi prius*, is required on Examination and Proof of such Offence, in a summary Way, to set Fines upon Persons so offending, as he shall think meet, not exceeding forty Pounds, nor less than twenty Pounds, according to the Nature of the Offence, to be estreated into the *Exchequer*.

And by *Señ. 3.* From the first Day of May, 1756, every Sheriff or other Officer to whom the Return of the *Venire facias*, or other Process for the Trial of Causes before Justices of Assize or *Nisi prius*, in any County, shall belong, shall upon his Return of every such Writ of *Venire facias* (unless in Causes intended to be tried at Bar, or in Cases

The Panel to be annexed by the Sheriff to the *Venire* on such Trials.

where a special Jury shall be struck by Order of Court) annex a Panel to every such Writ, containing the Christian and Sir-Names, Additions and Places of Abode of such Jurors as they shall return; which Number shall not be less than thirty-six, nor more than sixty, without the Direction of the Judges appointed to go the Circuit, and to sit as Judges of Assize or *Nisi prius* in such County, or one of them, who are impowered, if they see Cause, by order under their Hands, to direct a greater or lesser Number, and then such Number as shall be so directed, shall be the Number to serve on such Jury; and such Jury so returned, shall try all the Issues at that Assizes; and the Writs of *Habeas Corpora* or *Disstringas*, subsequent to such Writ of *Venire facias*, need not have inserted in the Bodies of such Writs, the Names of all the Persons contained in such Panel, but it shall be sufficient to insert in the mandatory Part of such Writs, *the Bodies of the several Persons named in a Panel to this Writ annexed*, or Words of the like Import, and to annex to such Writs, Panels containing the same Names as were returned in the Panel, to such *Venire facias*, with their Additions and their Places of Abode, that the Parties concerned in any such Trials may have timely Notice of the Jurors who are to serve thereon, in Order to make their Challenges to them, if

The Form of the
Disstringas, on
such Trials.

if there be Cause; and for making the Returns and Panels aforesaid, and annexing the same to their Writs, no other Fees shall be taken, than what are now allowed to be taken for the Return of the like Writs or Panels annexed to the same; and the Persons named in such Panels shall be summoned to serve on Juries at the then next Assizes or Sessions of *Nisi prius*, for the respective Counties to be named in such Writs, and no other.

And by *Sec. 4.* The Name of every Person, who shall be summoned and impannelled as aforesaid, with his Addition, and the Place of his Abode, shall be written on several distinct Pieces of Parchment, or Paper, being all as near as may be of equal Size and Bigness, and shall be delivered unto the Clerk of such Judge of Assize or *Nisi prius* who is to try the Causes by the Sheriff or Under-Sheriff of the County, or other Officer, returning the Process, and shall, by the Direction and Care of such Clerk, be rolled up all as near as may be, in the same Manner, and put together in a Box or Glass to be provided for that Purpose, and when any Cause shall be brought on to be tried, some indifferent Person, by Direction of the Court, shall in open Court, draw out twelve of the said Parchments or Papers one after another, and if any of the Persons whose Names shall be so drawn, shall not appear
or

Manner of Ballotting.

or shall be challenged and set aside, then such further Number until twelve Persons be drawn who shall appear; and after all Causes of Challenge shall be allowed as fair and indifferent, and the said twelve Persons so first drawn, appearing and approved of as indifferent, their Names being marked in the Panel, and they being sworn, shall be the Jury to try the said Cause; and the Names of the Persons so drawn and sworn, shall be kept by themselves, in some Box or Glass, to be kept for that Purpose, till such Jury, have given in their Verdict, and the same is recorded, or until such Jury shall, by Consent of the Parties, or Leave of the Court, be discharged, and then the same Names shall be rolled up again, and returned to the former Box or Glass, there to be kept with the other Names, remaining at that Time undrawn, and so *toties quoties*, as long as any Cause remains then to be tried.

Jury may be
drawn to try a
second Cause
Verdict on first
not being
brought in.

And by *Seet. 5.* If any Cause shall be brought on to be tried in any of the said Courts respectively, before the Jury in any other Cause shall have brought in their Verdict, or be discharged, it shall be lawful for the Court to Order twelve of the residue of the said Parchments or Papers, not containing the Names of any of the Jurors who shall not have so brought in their Verdict, or be discharged, to be drawn in such
Man-

Manner, as is aforefaid, for the Trial of the Cause which shall be brought on to be tried.

And by *Secl. 6.* Every Person whose Name shall be so drawn, and who shall not appear, after being openly called three Times, shall, upon Oath made by some credible Person, that such Person, so making Default, had been lawfully summoned, forfeit and pay, for every Default in not appearing upon Call as aforefaid (unless some reasonable Cause of his Absence be proved, by Oath or Affidavit, to the Satisfaction of the Judge who sits to try the said Cause) such Fine not exceeding twenty Pounds, and not less than forty Shillings, as the said Judge shall think reasonable to impose for such Default; which Fine, so imposed, the Judges are required to estreat into the *Exchequer*.

Penalty on Defaulters.

And by *Secl. 7.* Provided that where a View * shall be allowed in any Cause, in

Method on a View on such Trials in Counties.

* Note, in all Cases where a View is desired a Motion is to be made by the Plaintiff's Attorney for Liberty to insert a Clause for the same in the *Disfringas Jurator*. And it is said, that before the Court will make a Rule for a View the *Venire facias* must be returned.

And if the Question be about Part and Parcel of Land, then it is usually added to the Rule for a View that the Defendant do file and strike Mearsmen

in such Case, six of the Jurors who shall be named in such Panel, or more, who shall be mutually consented to by the Parties or their Attornies on both Sides (or if they cannot agree, shall be named by the proper Officer of the respective Courts of *King's-Bench*, *Common-Pleas*, or *Exchequer*, at *Dublin*, for the Causes in their respective Courts) shall have the View; and such of them as appear, and shall not be challenged off, shall be first sworn upon the Jury to try the said Cause, before any drawing as aforesaid, and so many only shall be drawn, to be added to the Viewers, who appear and are sworn, as shall, after all Defaults and Challenges allowed, make up the Number of twelve to be sworn for the Trial of any such Cause.

And

men in four Days after the Service of the Rule or the Officer to be thereby at Liberty to strike the same; and this Rule with the Name of a Mears-man for the Plaintiff is to be served upon the Defendant's Attorney, who is to return the Name of a Mears-man for the Defendant or the Officer will proceed according to the Rule; and when a Mears-man is so returned for the Defendant, then the Plaintiff's Attorney is to take out a Summons from the Officer of the Court appointing all Parties to meet at the Pleas Office of this Court at a certain Time mentioned in the Summons to settle Mears-men and Jury for a View pursuant to the Statute and Order of Court, and this Summons is to be served on the opposite Party, and if both Parties meet they then proceed to settle the Mears-men and the Jury for a View. If the Defendant makes Default the Officer will settle them.

And by *Seet. 8.* Provided also, that whensoever it shall happen that a Jury for the Trial of any Issue by *Nisi prius*, shall not be returned by the Sheriffs, but shall be returned by the Coroners, or other Officers legally appointed, that such Coroners, or Officers shall return the same Number of Jurors, and under the same Qualifications as the Sheriff by Law is bound to do, and the Jurors, so returned, shall be ballotted for in the same Manner.

Coroners or other Officers to return Jurors in the same manner as the Sheriff.

And by *Seet. 9.* And whereas it may happen that a sufficient Number of the Jurors returned may not appear after legal Challenges; a *Tales* may be granted, and returned as has been heretofore used.

A *Tales* may be returned.

And by *Seet. 10.* If at any Time after the Commencement of this Act, any Plaintiff or Demandant, in any Cause between Party and Party, depending in any of the King's Courts at *Dublin*, which shall be at Issue, shall sue forth any Writ of *Venire facias*, upon which any Writ of *Habeas Corpora*, or *Distingas*, with a *Nisi prius*, shall issue, in order to the Trial of such Issue, at the Assizes or the Sitting in the Court of *King's-Bench*, *Common-Pleas*, or *Exchequer*, in, or after Term, for Trial by *Nisi prius*; and that such Plaintiff or Demandant shall not proceed to the Trial of

Plaintiff not proceeding to Trial after *Venire* issued may have a new *Venire* for the next Assizes or sitting except where Views are directed.

of such Issue, at the said first Assizes, or next Sitting in the said Courts, after the test of every such Writ of *Habeas Corpora*, or *Disstringas*, with a *Nisi prius*; then, and in all such Cases, other than where Views by Jurors shall be directed, the Plaintiff or Demandant, whensoever he or she shall think fit to try such Issue at any other Assizes or Sitting in the said Courts, shall sue forth and prosecute a new Writ of *Venire facias*, directed to the Sheriff, or other returning Officer; which Writ being duly returned and filed, a Writ of *Habeas Corpora*, or *Disstringas*, with a *Nisi prius*, shall issue thereupon, for which the antient and accustomed Fees shall be taken, and no more, as in the Case of the *Pluries Habeas Corpora*, or *Disstringas*, with the *Nisi prius*; upon which the Plaintiff or Demandant may proceed to Trial, as if no former Writ of *Venire facias* had been prosecuted or filed in that Cause, and so *toties quoties*, as the Case shall require.

So a Defendant or Tenant who would try a Cause by *Proviso* may issue a new *Venire facias*.

And by *Sett. 11.* If any Defendant or Tenant, in any Action depending in any of the said Courts, shall be minded to bring to Trial any Issue joined, when by the Course of any of the said Courts, they may lawfully do the same by *Proviso*, such Defendants or Tenants, may, the issuable Term next preceding such intended Trial to be had at the next Assizes or Sitzings in the said Courts, sue

sue out a new *Venire facias* to the Sheriff, or other returning Officer, by Proviso, and prosecute the same, by Writ of *Habeas Corpora*, or *Distingas*, with a *Nisi prius*, as though there had not been any former *Venire facias* sued out or returned in that Cause, and so *toties quoties*, as the Matter shall require.

And by *Secl. 12.* Every Writ of *Venire facias*, and every Writ of *Habeas Corpora*, or *Distingas*, with a *Nisi prius*, sued out and prosecuted according to the Direction of this Act, and all Trials, Entries, and Proceedings thereupon, shall be good and warrantable by Law, and not be erroneous, or be assigned or assignable for Error.

All Proceedings by Direction of this Act warranted by Law and not assignable for Error.

And by *Secl. 13.* Provided, that nothing in this Act shall extend to qualify any Person of the popish Religion to serve on any Jury, in such Cases, where, by *Stat. 8 Ann. Cap. 3.* or by any other Law now in being, such Persons are rendered incapable of being Jurors, or to serve on Juries, or on the Trials of any Issues, or any Action depending in any of the Courts above-mentioned, where such Action or Suit is commenced and carried on by a Protestant against a Papist, or a Papist against a Protestant; in which Cases, it shall be lawful to Challenge any Papist, returned as a Juror, to try the Issue in
any

Papists disqualified to be Jurors and in what Cases.

any such Case, and assign for Cause, that the Person so returned to serve, is a Papist, or reputed Papist; which Challenge, the Judge or Judges, before whom the same is to be tried, shall allow if proved, and adjudge the same to be a good Challenge.

And by *Sec. 15.* This Act shall continue in Force, until the first Day of *May*, 1758, and to the End of the then next Session of Parliament.

Proceedings upon Trials.

Proceedings to
Trial.

When the *Distingas Juratores* is returned by the Sheriff, then the Plaintiff's Attorney may bespeak the Issue of *Nisi Prius* in the Office of Pleas; and when it is signed and sealed, if the Trial is to be by *Nisi Prius*, before the Lord Chief Baron in one of the Sittings in this Court, in, or after Term, he is to lodge it with the Lord Chief Baron's Clerk regularly two Days before the Trial; and if the Trial be at the Assizes, it is to be given to the Judge's Clerk.

The Briefs for
Council.

But before the Record is delivered to the Judge's Clerk, as aforesaid, the Briefs are to be prepared to instruct the Council, wherein the Case must be briefly, but fully set forth; the Proofs be placed in Order, and proper Answers to what it is supposed may be objected on the other Side.

Upon

Upon the Day of Trial, when the Jury are sworn, they are bid to stand together and hear their Charge; which being done, the Council on both Sides open the Case by declaring the Cause of Suit &c. one after another, and argue the Matter in Contest, producing Witnesses to prove what they alledge, and when the Council have done, and the Judge has summ'd up the Evidence, he delivers it to the Jury; and if they depart from the Bar a Bailiff is sworn to keep them without Meat or Drink, &c. till they are agreed: and when they are all agreed, they return to give in their Verdict; then the Party Plaintiff is called, and if he do not appear the Defendant is to pay the Jury and the Fees of the Court, and a *Non Suit* shall upon Council's Motion be recorded.

But if the Plaintiff appear, then the Clerk asks the Jury, whom the find for, and what Costs and Damages, and enters it on the Back of the Panel; and repeats it to the Jury; and then upon Council's Motion the Verdict shall be recorded, which finishes the Trial.

If the Defendant appears not when he is called, he loses the Benefit of his Challenge to the Jurors; but if he appears, he may Challenge them.

Defendant to appear when called or loose the Benefit of his Challenge.

Postea.

When the Trial is over, if your Action be laid in *Dublin*, the Chief Baron's Clerk, or the Clerk to the Judge of Assize, if the Trial be at the Assizes, will engross the *Postea* and deliver it to the Party in whose Favour the Verdict is, the Purport of which *Postea* is, *That afterwards the Plaintiff and Defendant came by their Attornies, before such Judge, and the Jury was elected sworn, &c. and found such a Verdict, and so much Costs, &c. and the Fee to the Clerk for the Postea, is 16s. 8d.*

Conditional Rule
for Judgment
thereon.

Then if the Trial be by *Nisi prius* in one of the Sittings in Term, if the Plaintiff obtains a Verdict, he may the Day after move the Court by his Council for Judgment upon the *Postea* and *Verdict*, and the Court will grant a Rule for Judgment if no Cause be shewn to the contrary in four Days, (which four Days are given the Defendant to speak in Arrest of Judgment if he hath any Cause for it;) but if the Trial be in the Sitting after Term, or at the Assizes, such Motion is to be made on the first Day of the next ensuing Term; and in either Case, when the Rule is out, if Judgment be not arrested, the Court upon Motion to be made by the Plaintiff's Attorney upon an attested Copy of the Rule for Judgment will grant the Plaintiff Judgment without further Motion; and

Motion in Arrest
of Judgment.

Judgment absolute.

and he may then apply to the Officer of the Court, and he will Tax the Cost, and the Plaintiff may then issue Execution as is before directed, either by *Capias ad Satisfaciendum*, *Fieri facias*, or *Elegit* for the Debt and Damages, or for the Damages Expences and Costs, according as the Action is. See Pag. 167.

Execution.

The Defendant is to proceed in the same Manner if he obtains a Verdict against the Plaintiff, or if the Plaintiff be *Non suited* for not appearing on the Trial; for such *Non Suit* is in the Nature of a Verdict against the Plaintiff, and the Defendant may have Execution for his Expences and Costs as aforesaid.

Non Suit and Execution for the Expences and Costs.

If a Plaintiff doth not proceed to Trial within a Year and a Day after Issue is joined, he cannot afterwards proceed without Leave of the Court, which will be granted upon Motion of the Plaintiff's Attorney, giving the Defendant a Term's Notice.

Plaintiff not proceeding to Trial for a Year and a Day after Issue.

The usual Costs for not going to Trial at the Assizes, by *Nisi prius* after the Plaintiff has given the Defendant proper Notice thereof is 5*l*. But in this Case, an Affidavit is to be made that such Notice has been served, and also that the Defendant has expended 5*l*; for otherwise, he shall have no more than he makes appear by his Affidavit to have been expended, and the Cost for not

Cost for not going to Trial at the Assizes, or before the Lord Chief Baron after Notice.

proceeding to Trial before the Lord Chief Baron after Notice, in one of the Sittings in Term, or in the Sitting after Term is 3*l*. it appearing by Affidavit that so much has been expended, and that proper Notice has been given as aforesaid. But 5*l*. in Case the Trial be at the Assizes, and 3*l*. if before the Chief Baron in *Dublin* are not to be exceeded tho' sworn to.

19th Nov. 1672.

RULE

Notice of Trial by *Nisi prius* to be in Writing.

Ordered that Notice of all Trials by *Nisi prius* be given in Writing either to the Defendant, or his Attorney upon Record in this Court.

26th June 1685.

RULE

Records of *Nisi prius* when to be entered with the Clerk, and when to be bespoken in the Office.

Ordered that for the future all Records of *Nisi prius* be entered with the Clerk of the *Nisi prius* two Days before the Day appointed for the Trial, and that the said *Nisi prius* and Records be bespoken in the Office six Days before such Trial to be made up and enrolled; and that all Records upon Demurrer be made up and enrolled before any Motion be made in Court for reading thereof.

Demurrer.

19th June, 1700.

RULE

Posting Notice in the Office of Trial of any Issue in the Absence of an Attorney to be good Service.

Ordered for the future that where any Attorney of this Court shall in Term time happen to be out of the City of *Dublin*, that in such Case, the leaving the usual Notice in the Pleas Office of this Court of the Trial of any Issue depending in the said Office shall be deemed sufficient Notice of any such Trial to be had as aforesaid.

Ordered

Ordered that the Clerk of the Pleas Office of this Court do for the future, upon Recoveries upon single Bills, tax and allow the Plaintiff Interest for the same from the Date of the said single Bill, or the Day of the Payment thereof.

15th Nov. 1702.

RULE.

Interest to be taxed on Recoveries on single Bills.

Ordered by the Court, that Notice given (within two Days after filing the Defendant's Plea for Trial by *Nisi Prius* at all Assizes) be deemed good Notice when the sitting of Assizes will not admit of fourteen Days Notice as formerly: And that in all other Cases the former Notice of fourteen Days be given as formerly, and the same Rule was made the 9th July, 1698, and again the 12th of Feb. 1702, with this Addition, that the Order then made, shall be observed as a general Rule for the future upon all Trials by *Nisi prius* at the Assizes.

22d June 1681.

11th July 1696.

17th July 1697.

RULE.

In what Cases less than 14 Days Notice of Trial by *Nisi prius* shall be sufficient.

Some Rules and special Cases with several Statutes relating to the Venire facias, Distringas, Juratores, and Writ of Nisi prius.

The first Process for convening the Jury is the *Venire facias*, which is a judicial Writ, and must be awarded on the Roll and thereupon, in the Common-Pleas, there issues the *Habeas Corpora*,

Venire facias,
what.

and after it the *Distringas Juratores*, but in the *King's Bench* and *Exchequer* after the *Venire*, they proceed on the *Distringas*; for the *Venire* being in the nature of a Summons, if the Jury did not appear thereon in those Courts in which the King has a more immediate Concern, they proceed on the strongest Process, viz. the *Distringas*. For an Account and Explanation of a *Venire facias*. See *Trials per Pais*, 30. &c.

How to be directed.

Suggestion of Kindred in the Sheriff, *Venire* to the Coroners.

Coroners not indifferent, *Venire* to *Elisors*.

And this Writ is generally directed to the Sheriff of the County where the *Venue* is laid in the Declaration, to cause a Jury to appear when a Cause is brought to issue to try the same. But if the Sheriff be of Kindred by Nature, or of Affinity by Marriage to any of the Parties; or (that I may say all in a few Words) if he be not indifferent almost in all Respects, as he is whom the Law allows to be a Juror, he ought not to meddle with the Returning of the Jury, but the Court upon a Suggestion thereof, and upon Council's Motion thereon, will order the *Venire facias* to be directed to the Coroners (or to some of them if the Residue be not indifferent,) who in that Respect are *hac Vice Vicecom'*, and if the Coroners are not indifferent, then the *Venire* shall be directed to two *Elisors* or *Eslistors*, *ab Eligendo*, that is, to whom the Court shall choose or deem fit to return the Jury; and to the Return of the *Elisors* no Challenge will be admit-

admitted. *Bro. Tit. Venire facias*, 14.
As to the Array, but to the Polls. 1 *Inst.*
158. *Trials per Pais*, 33.

The Suggestion is to be ingrossed on Parchment, and to be signed by Council and Attorney, before a Motion is made thereon.

Suggestion to be ingrossed and signed by Council and Attorney.

If one of the Sheriffs of *Dublin* (or of any Place where two Persons make one Sheriff) be a Party; then the *Venire* may on such Suggestion and Motion as aforesaid, be directed to the other Sheriff, if the under Sheriff be a Party, yet the *Venire* may be directed to the Sheriff, with this Proviso, that your under Sheriff shall in no sort intermeddle with the Execution of this Writ. *Trials per Pais*, 33.

Where two Sheriffs and one a Party *Venire* directed to the other.

Judicial Writs may be directed to the Coroners, as the *Venire facias*. Where the Parties are at Issue, there, upon the Surmise of the Plaintiff that the Sheriff is his Cousin, and upon Prayer that the *Venire* be directed to the Coroners, for Avoidance of his own Delay that might happen by the Challenge of the Array, the Defendant shall be examined whether it be true or not, and if he confesses it, then the *Venire* shall be awarded to the Coroners, for then it appears to the Court by the Defendant's Confession, that the Sheriff is not indifferent; but if the Defendant denies

Venire facias to the Coroners on Suggestion of the Plaintiff that the Sheriff is his Cousin.

Defendant to be examined thereon.

But not on the
Defendant's
Suggestion.

it, then the Process shall be awarded to the Sheriff, because the Sheriff's Authority and Profit shall not be taken away without Cause apparent to the Court; and in such Case, the Defendant shall never challenge the Array for that Cause. But if the Defendant will alledge any such Matter and pray a *Venire facias* to the Coroners, there, the Plaintiff shall not be examined, neither shall such Allegations be allowed, because Delays are for the Defendant's Advantage, and the Defendant may challenge the Jury for this Cause, and so is at no Prejudice. *Trials per Pais*, 33, 34.

Special Jury the
Venire facias to
be special.

In all Cases, where there is a special Jury, the *Venire facias* must be special. 2 *Lill. Abr.* 635.

Knight to be re-
turned on the
Jury where a
Lord is Party.

If a Peer of the Realm, or Lord of Parliament be either Plaintiff or Defendant in a Cause, the Sheriff or other returning Officer, must return a Knight on the Jury be he Lord Spiritual or Temporal.

One *Venire facias*
to try several is-
sues.

One *Venire facias* is sufficient to try several Issues between the same Parties, in the same County. 2 *Cro.* 550.

Two Defendants
and after *Venire*
issues one dies.

And where an Action was brought against two, they both joined Issue, and one died, and after, the *Venire facias* was awarded to try the Issue between both,

both, which was done, and held to be no Error, tho' it issued against a dead Person, because one of the Defendants was living. *Cro. Car.* 308. *Nelf.* 444.

If a Matter of Law be depending in Court undetermined, and an Issue also joined in the Cause, there is to be a special *Venue* awarded, *tam ad Triandum exitum, quam ad Inquirendum de Damnis*, &c. as well to try the Issue as to find the Damages both upon the Issue and the Matter put in Judgment of the Court. *2 Lill. Abr.* 636.

Special Venire where there is matter of Fact and matter of Law.

A *Venire facias* after it is filed, cannot be altered without the Consent of the Parties: Though where a Verdict in a Cause is imperfect so that Judgment cannot be given upon it, there shall be a new *Venire facias* to try the Cause, and find a new Verdict. *2 Lill. Abr.* 634, 635.

Venire facias not to be altered but by Consent.

If there be a Mistake in the Record of the *Nisi prius*, and the Plaintiff is *non suit* for this Mistake, if the Record in Court be right, this *non suit* shall not be recorded, but upon Motion to the Court, a *Venire facias de novo* shall be awarded and the Issue tried; for this is a *non Suit* upon another Record than what is in Court. *Cro. i. Par.* 104. *Trials per Pais*, 46. *Cro. Jac.* 669.

Venire facias de Novo where Plaintiff is *non suited* for a mistake in the Record of *Nisi prius* the Record in Court being right.

For-

Venire facias awarded of the Body of the proper County where the Issue is triable.

Formerly by the 10 *Cha.* 1 ch. 13. in every Panel upon every *Venire facias*, the Sheriff was obliged to return two sufficient Hundredors at the least (if there were so many within the Barony or Hundred, &c. within which the Matter issuable was alledged,) and the Jury were to be *de Vicineto*; *quia Vicinus facta Vicini præsumitur scire*. But great Delays frequently happening in Trials by Reason of Challenges to the Arrays of Panels of Jurors, and to the Polls, for Default of Hundredors, for the Prevention thereof for the future it was enacted.

Exception.

By 6 *Ann.* ch. 10. that every *Venire facias* for the Trial of any issue in any Action, or Suit in the *Queen's-Bench*, *Common-Pleas*, or *Exchequer*, at *Dublin*, shall be awarded of the Body of the proper County, where such Issue is triable. But this was not to extend to Appeals of Felony, or Murder, or to any Indictment, Presentment, &c. of Treason or Felony, or to any Writ, Bill, Action, or Information upon a penal Statute.

New *Venire* except where Views are directed.

And note, by the aforesaid Act 29 *Geo.* 2 ch. 6. after a *Venire facias* has issued for the Trial of a Cause at an Assizes or Sittings and the Plaintiff hath not proceeded to Trial thereon, he may have a new *Venire* for the next Assizes
or

or Sitzings, except where Views are directed: And this is in order to prevent the Trouble and Expence which Jurors to try Causes were frequently put to, by being compelled to attend at several Assizes for Trial of one and the same Cause.

The *Distingas Juratores*, is a judicial Writ directed to the Sheriff, to distrain upon the Jurors to appear and return Issues upon their Lands, &c. for *non Appearance*—Where an Issue in fact is joined to be tried by a Jury, which is returned by the Sheriff in a Panel upon a *Venire facias* for that Purpose, thereupon there goes forth a Writ of *Distingas Juratores* to the Sheriff commanding him to have their Bodies in Court, &c. at the Return of the Writ. 1 *Lill. Ab.* 483.

Distingas Juratores.

And the Writ of *Distingas Juratores* ought to be delivered to the Sheriff so timely, that he may warn the Jury to appear six Days before the Day of Trial, if the Trial is to be at the Assizes, and twenty-four Hours at least if in the City of *Dublin*.

When to be delivered to the Sheriff.

There may be an *Alias & Pluries Distingas Juratores* where the Jury do not appear.

Alias & Pluries Distingas.

In

Distringas Juratores between wrong Parties the Judge cannot proceed.

If the *Distringas Juratores* be between wrong Parties, as if the Parties Names be mistaken, the Judge of Assize cannot proceed if the Mistake be insisted upon, altho' it would be no Error after Verdict. See *Littleton's Reports*, 253, and *Trials per Pais*, 31.

Of the Teste and Return of the Venire facias and Distringas.

Venire and Distringas at the Assizes.

Every *Venire facias* that issues to the Assizes must bear Teste the first Day of that Term, in, or after which it issues, and be returnable the last Return of the same Term; and the *Distringas* must bear Teste the last Day of the same Term, and be returnable the first Return of the ensuing Term.

Venire and Distringas at Bar.

Every *Venire* at Bar must bear Teste the first Day of the Precedent Term, and be returnable the last Return of the same Term; and the *Distringas* must bear Teste the last Day of the precedent Term, and be returnable the Day on which the Issue is to be tried.

Venire and Distringas before Lord Chief Baron in Term time on *Nisi prius*.

Every *Venire* of *Nisi prius* before the Lord Chief Baron in Term Time must bear teste the last Day of the precedent Term, and be returnable the first Return of the Term in which the Trial is;
and

and the *Disfringas* must bear teste the first Day of the Term in which it issues, and be returnable the first Return after the Day of Trial.

Every *Venire* before the Lord Chief Baron after Term must be tested the first Day of the Term, after which it issues, and is returnable the last Return; and the *Disfringas* must be tested the last Day of the same Term, and returnable the first Day of the ensuing Term.

The like after Term.

This was the constant Practice in the testing and returning the *Venire facias* before the following Statute of the 7 Will. 3. for, by the common Law, there must have been fifteen Days between the Teste and Return of every *Venire* and *Disfringas*, by which Means the *Venire* used to be frequently tested before Issue was joined in the Cause, and the same Practice is still continued, tho' there seems to be no Necessity for it at this Day.

By the said 7 Will. 3 ch. 25. it is enacted, that in all Actions of Debt, and other personal Actions whatsoever, and also in Actions of *Ejection. Firm.* for Lands and Tenements, which shall be depending in this Court, after any Issue thereupon joined to be tried by a Jury, and also after Judgment had, or to be had therein, there shall not need to be fifteen

The want of 15 Days between the Teste and Return of *Venire facias Disfringas*, Ca'ja' or Fieri facias no Error.

fifteen Days between the Tefte and Day of Return of any Writ or Writs of *Venire facias*, *Habeas Corpora Jurator*, or *Distringas Juratores*, Writs of *Fieri facias*, or Writs of *Capias ad Satisfaciendum*, and that the Want thereof fhall be no Caufe of Error.

Of the Trial at Bar.

The Trial by *Nifi prius* as has been before faid was designed and ordained for the Eafe of the Country, the Parties, Jurors, Witneffes, by faving them the Charge and Trouble of coming to *Westminster*: But in Matters of great Weight and Difficulty, the Judges above, upon Motion and Information, will retain Caufes to be tried there, tho' laid in the Country; and then the Juries and Witneffes in fuch Caufes, muft come up to the Courts at *Westminster* for Trial at Bar.

Trial at Bar.

Where either Party is inclined to have a Trial at Bar, the Court on Council's Motion will grant the fame; but on this Motion, an Affidavit is to be produced by which it may appear that the yearly Value of the Lands is above forty Shillings, and it muft alfo appear that it is a Cafe of Difficulty and will require great Examination, or fome other fufficient Reason, but the Court will not require the Party to fet forth what the Point

Point of Law is: And the Party who moves for such a Trial, is to lodge with the proper Officer of the Court, such a Sum of Money as the Court shall judge sufficient to defray the Expences of the Jury on such Trial; which Sum is generally proportioned to the Distance of the Place from which the Jury is to come. See 12 *Ed.* 2 Stat. 1. ch. 3.

In the Case of Lessee of *Damer* against *Mabony* in this Court *Easter Term* 1742, on a Trial at Bar, a full Jury not appearing, it was ordered on Council's Motion, that the Money lodged in Court should be paid to such of the Jury as did appear, and that a *Remanet* for want of a Jury should be enrolled; and that a *Distringas decem tales* should issue, and that the Issue should be tried at the Bar of the Court the first Law Day in the next Term by a Jury of the same County, and that the Sum of fifty Pound should be lodged before the *Distringas* should issue. *Remanet pro defect. Jurator.*

It is not usual to grant a Trial at Bar the same Term in which it is moved for, but the next Term after, except special Reasons be given. *Trial at Bar seldom granted the same Term it is moved for.*

On Trial at Bar the Court gives Judgment immediately unless a Day be prayed, and it is seldom granted. *On Trial at Bar the Court gives immediate Judgment.*

And

The Notice to be given and other Proceedings on Trials at Bar.

And note, that the same Notice is to be given of a Trial at Bar as of a Trial by *Nisi prius* at the Assizes, *to wit*, fourteen Days, as is before directed in Page 188. And the Proceedings upon these Trials, as to the returning of Juries, and upon Views are the same as upon Trials by *Nisi prius* in Counties of Cities and Counties of Towns, and as they were before the Statute 9 Geo. 2 ch. 3.

Trial at Bar seldom granted in an issuable Term, and the Application to be made early in the preceding Term.

But this Trial at Bar is seldom granted in an issuable Term and the Motion for it should, regularly, be made early in the preceding Term.

Motion for a Trial at Bar refused on the last Day of Term.

In the Case of *Teige* against *Sandford* in this Court *Trinity Term* 1751, a Trial at Bar was moved for on the last Day of the Term by the Defendant's Council and refused upon a most solemn Debate, as the Plaintiff had not an Opportunity to shew Cause against it, and would be hindred of a Trial at the following Assizes.

Trial at Bar refused in an issuable Term altho' the Crown was concerned.

In the Case of the Attorney General in Behalf of his Majesty against *Dillon*, in the Pleas Office of the Revenue Side of this Court *Michaelmas Term* 1751, the Court altho' the Crown was concerned refused to grant a Trial at Bar in the Term following, as it was an issuable Term.

Term.——See also the Case *Lessee Bagenal* against *Hardy*, *Easter Term*, 1755.

Trial by Proviso.

IF after Issue joined, the Plaintiff will Trial by Proviso. not proceed to Trial within the third Term inclusive, the Defendant may then move by his Attorney for a Trial by *Proviso*.

This Process by *Proviso*, i. e. with a Ibidem. Clause, that if two Writs come to the Sheriff's Hands he shall execute one of them only, may be taken out, not only when the Plaintiff neglects to take out the *Venire* within the Time aforesaid, but also upon his Neglect to get it returned; and in like Manner if the Plaintiff makes the same Default in suing out a *Distringas Juratores*, or other subsequent Process, the Defendant may sue out the like Process by *Proviso*. 3 *Bacon Abr.* 246.

By 29 *Geo.* 2. ch. 6. if any Defendant Trial by Proviso, how. in any Action, would try any Issue joined against him, when by the Course of the Court he may do the same by *Proviso*, such Defendant may the issuable Term next before such Trial to be had at the next Assizes or Sitings in the said
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Courts, sue out a *Venire* to the Sheriff, or other returning Officer by *Proviso*, and prosecute the same by *Habeas Corpora* or *Distringas* with a *Nisi prius*, as tho' there had not been any former *Venire* sued out in that Cause; and so *toties quoties* as the Matter requires.

Cause sent down by *Proviso*, Plaintiff can't withdraw the Record.

If a Cause be carried down by *Proviso*, the Plaintiff cannot withdraw the Record, because it is now become the Record of the Defendant; and if upon the Trial the Plaintiff shall suffer himself to be *non suited* the Defendant shall have his Costs.

Notice of Trial by *Proviso*.

The Defendant is obliged to give the same Notice of Trial by *Proviso*, as the Plaintiff should have given in Case he had proceeded to Trial. *Mich. 9 Geo. 2. Pract. Reg. 388.*

Defendant a Pauper obliged to pay Costs for not going to Trial pursuant to Notice by *Proviso*.

If a *Pauper* Defendant gives Notice of Trial by *Proviso*, and neither tries the Cause, nor countermands the Notice, it is discretionary in the Court to oblige him to pay Costs, or dispauper him; and if the Costs be taxed, and demanded, and the Defendant afterwards gives another Notice of Trial by *Proviso*, the Court, on Motion, will stay the Defendant from trying his Cause until he pays the Costs for not proceeding to Trial pursuant to the first Notice. *Mich. 2 Geo. 2. Pract. Reg. 405, 406.*

On his giving a second Notice of Trial Proceedings stayed till he pays the Costs of the first Notice.

Trial per Medietatem Linguae.

In all Pleas depending between Natives and Strangers the Jury or Inquest to be impanelled for the Trial of the Issue, shall (if the Alien requests it) consist, the one Half of Natives, and the other of Strangers; and this is what in our Law is called the Trial *per Medietatem Linguae*.

Trial per Medietatem Linguae,
what.

This Trial by the common Law, was wont to be obtained of the King by his Grant made to any Company of Strangers, as to the Company of *Lombards* or *Almaignes*, or to any other Company, that when any of them was impleaded, the Moiety of the Inquest should be of their own Tongue. *Stanf. Plea, Cor. Lib. 3 ch. 7.*

And this Trial in some Cases *per Medietatem Linguae* was before the Conquest as appears by *Lamb, fo. 91. 3 Viri duodecim Jure Consulti, Angliæ sex, Walliæ totidem, Anglis & Wallis Jus dicunt*, and of antient Times it was called *Duodecim virale Judicium*. *1 Inst. 155. b.*

Its Antiquity
and when and
how first instituted.

But afterwards the Law became universal, first by the Statute of 27 *Ed. 3. ch. 8.* it was enacted, that in Pleas before the Mayor of the Staple, if both

When the Law
as to these Trials
became universal.

Parties were Strangers, the Trial should be by Strangers, but if one Party was a Stranger and the other a Denizen, then the Trial should be *per Medietatem Linguae*.

Ibidem.

This Trial to be
altho' the King
be a Party.

But this Statute extended but to a narrow Compass, *to wit*, only where both Parties were Merchants, or Ministers of the Staple; and in Pleas before the Mayor of the Staple, but afterwards in the 28th Year of the same King's Reign, *Ch. 13.* it was enacted, that in all Manner of Inquests, and Proofs, which be to be taken, or made amongst Aliens and Denizens, be they Merchants, or others, as well before the Mayor of the Staple, as before any other Justices or Ministers, altho' the King be Party, the one Half of the Inquest or Proof shall be Denizens and the other Half Aliens, if so many Aliens or Foreigners be in the Town, or Place, where such Inquest or Proof is to be taken, that be not Parties nor with the Parties in Contracts, Pleas, or other Quarrels, whereof such Inquest or Proof ought to be taken; and if there be not so many Aliens, then shall there be put in such Inquests or Proofs, as many Aliens as shall be found in the same Town or Places, which be not thereto Parties, nor with the Parties as aforesaid; and the Remnant of Denizens, which be good Men, and not suspicious to one Party nor to the other.

So that this is the Statute which makes the Law universal concerning the *Medietatem Linguae*, for though the King be Party, yet the Alien may have this Trial; and it matters not whether the Moiety of Aliens be of the same Country as the Alien Party to the Action is; for he may be a *Portuguese*, and they *Spaniards*, &c. because the Statute speaks generally of Aliens. See *Dyer*, 144. *Trials per Pais*, 245.

The Moiety of Aliens may be of a different Country from the Party Alien, so that they be Aliens.

And the Form of the *Venire facias* in this Case is, *of your County and so forth, of which, let the one Half be Denizens and the other Half Aliens, and so forth.* And the Sheriff ought to return twelve Aliens and twelve Denizens alternately, distinguishing the Aliens by an Addition for that Purpose, and so they are to be sworn. *Cro.* 3. part. 118.

Form of the *Venire facias*.

But if this Order be not observed, it being but a mis-return, shall be helped by Verdict in Cases within the Statutes of Jeofail. 3 *Bacon's Abr.* 263.

But if it should happen that both Parties are Aliens, it is resolved, that the Inquest shall be all *English*; for though the *English* may be supposed to Favour themselves more than Strangers, yet when both Parties are Aliens, it is

Both Parties Aliens, the Inquest to be all *English*.

presumed they be indifferent. *Trials per Pais*, 245. 21 *Hen.* 6. 4.

Insufficiency or Want of Freehold no Cause of Challenge to Aliens.

By the Stat. of 8 *Hen.* 6. ch. 29. Insufficiency, or want of Freehold, is no Cause of Challenge to *Aliens* who are impanelled with the *English*; for this Statute saith, That the Statute 2 *Hen.* 5. ch. 3. shall extend only to Inquests between Denizen and Denizen, and therefore it hath been adjudged *Quorum quilibet habeat*, &c. shall be applied to the *English* only. *Cro. Eliz.* 272. 841.

When the Alien should pray the Benefit of the Statute.

If an Alien neglect to pray the Benefit of the Statute before the Return of a common *Venire*, he can neither except to such *Venire*, nor pray a subsequent Process *de Medietate Linguae*, 3 *Bacon. Abr.* 263

A *Tales* may be on this Trial.

If on a *Venire facias de Medietate Linguae* enough to make up a full Number of six Denizens, and six Aliens do not appear to be sworn upon the Trial, (for a full Number of each must appear) the Justices of *Nisi Prius* may by Construction of the Statutes which give a *Tales de Circumstantibus*, award such a *Tales* for so many Denizens and Aliens as shall be wanting. 3 *Bacon. Abr.* 263.

On a general *Venire facias* no *decem Tales*, &c. *per Medietatem Linguae*.

If an Alien hath a general *Venire facias* he cannot pray a *Decem Tales*, &c. *per medietatem Linguae* upon this, because the *Tales* ought to pursue the *Venire*

nire facias; and so if the *Venire facias* be per medietatem Linguae, and if six Denizens and five Aliens appear of the principal Jury, the Plaintiff may have a *Tales per Medietatem Linguae*; but if in this Case the *Tales* be general de Circumstantibus, it hath been held good enough, for there being no Exception taken by the Defendant upon the awarding thereof, it shall be intended well awarded. Cro. 3 part. 118, 841. *Trials per Pais*, 247.

If the Defendant do not inform the Court that he is an Alien upon the awarding the *Venire facias*, and so pray a *Venire facias per Medietatem Linguae*, he cannot Challenge the Array for this Cause at the Trial, if the Jury be all Denizens, for the Alien at his Peril should pray *Venire facias per Medietatem Linguae*. *Trials per Pais*, 248. *Dyer*, 357. *Vid. Rolls. Tit Trial*, 643.

Venire facias per Medietatem Linguae to be prayed by the Defendant an Alien, or no Challenge to the Array.

If the Plaintiff be an Alien, he must suggest it before the awarding of the *Venire facias*, but if the Defendant be an Alien, the Plaintiff is allowed to surmise that, before or after the *Venire facias*; because the Defendant's Quality may not be known to him before. See *Trials per Pais*, 249.

Plaintiff an Alien to suggest it before the *Venire* is awarded, but may after, where the Defendant is an Alien.

If the Defendant be an Alien, on Notice given by his Attorney to the Plaintiff, or his Attorney, the Plaintiff ought

Defendant an Alien to give Notice to the Plaintiff thereof, and Plaintiff

to enter it on
the Roll.

to enter it on the Roll, to have a Trial *de Medietate*, at his Peril; but the Court refused to award it for the Defendant on his Affidavit that he was an Alien. See *Trials per Pais*, 249. *Keeble* 1. part 547.

If the Trial be
by all *English*,
where an Alien
is a Party, yet
it is not errone-
ous.

Where an Alien is Party, yet if the Trial be by all *English* it is not erroneous; because it is at his Peril if he will slip the Time, and not make Use of the Advantage which the Law giveth him when he should. *Dyer* 28.

Plaintiff or De-
fendant an Exe-
cutor or Admin-
istrator tho' an
Alien the Trial
shall be by *English*,
Aliter if the Tes-
tator or Intestate
was an Alien.

If the Plaintiff or Defendant be Executor or Administrator. &c. though he be an Alien, yet the Trial shall be by *English*, because he sueth in *Auter Droit*; but if it be averred that the Testator or Intestate was an Alien, then it shall be *per Medietatem Linguae*. *Cro.* 3 part 275.

Trial by Leading Order.

Trial by Lead-
ing Order what
and in what
Cases.

THIS Trial is upon a feigned Action commenced in the Pleas Side of this Court, in pursuance of an Order for that Purpose made in the Equity Side.

And this Order is usually granted when the Court upon the Hearing of the Cause doubts of some material intervening Fact,

Fact, which often happens when the Proofs relating to such Fact are opposite and contradictory, or uncertain, or when the Plaintiff goes into a Court of Equity for Damages which are uncertain, and not to be settled but by a Jury, and the Defendant answers and contests without demurring, in such and the like Cases, the Court will direct an Issue at Law to try the Fact or the *Quantum* of the Damages, as the Case is, and this is called a Leading Order.

*Quantum Damni-
ficatus.*

And by this Leading Order, the Plaintiff is ordered to commence forthwith a feigned Action in the Pleas Side of this Court, and that the Defendant doth forthwith appear thereto, and plead the general Issue, and admit of all Matters of Form, so that a Trial may be had by a Jury of the City or County where the Court shall direct, the Trial to be on the Issue expressed in the Order: And the Sheriff of the County or City where the Trial is to be, is ordered to return the Grand Panel of Freeholders to the Chief Remembrancer of this Court, who is desired to strike a Jury thereout for the Trial of the Issue; and either Party are to be at Liberty to read and give in Evidence on the Trial, the Deposition or Depositions of such Witnesses or Witnesses, who, by Reason of Death, or any other lawful Cause to be made appear by Affidavit cannot attend the Trial. And if a
sufficient

Proceedings
thereon.

Trial.

sufficient Number of the Jurors shall not attend the Trial, the Judge before whom the Trial is to be had, is by the Order desired at the Request of either Party to grant a *Tales*, and also to certify such Verdict as shall be given on the Trial.

Ibidem.

And a Copy of this Order attested by the Chief Remembrancer, is brought to the Clerk of the Pleas Office of this Court to be entered by him in a Book which is kept for that Purpose in his Office, and when it is entered there, he is also to attest it, for which you pay 1s. 6d. Fees, and it is afterwards to be signed by the Chief Baron, whose Fee is 6s. 8d.

Ibidem.

When the leading Order is brought to the Clerk of the Pleas Office as aforesaid, if the Defendant has appeared, the Plaintiff's Attorney may at the same Time file his * Declaration, at the Foot of which he is to write, that it is on a Leading Order that no Rules to plead may be entered thereon, for by the Order the Defendant is to plead to Issue; and let him give the Defendant's Attorney Notice thereof, and request

* The Declaration in this Case is generally an Action of Trespas on the Case on a feigned Bargain or Contract in Consideration of a Sum alleged to be received to pay another Sum on the Event of some Fact, generally the Issue to be tried.

request him to file his Plea forthwith, and when the Plea is filed, he may get a short Order drawn up in the Chief Remembrancer's Office for the Sheriff to return the Grand Panel or Book of Freeholders to the Chief Remembrancer; who in Presence of Attornies on both Sides, is to take thereout the Names of 48 Persons, from which each Attorney shall strike out Twelve, and the remaining 24 shall be certified by the Chief Remembrancer as the Jury to be impanelled by the Sheriff to try the Issue; but the Sheriff generally returns the Grand Panel without requiring to be served with such particular Order, and the Record is then to be made up and tried as in case of a special Jury at Common Law.

If the Attorney for either Party shall neglect to attend the Officer, he may after Service of one Summons, proceed *Exparte*, and strike 12 for the Attorney who makes Default. Ibidem.

The rest of the Proceedings are as upon other Trials.

A De-

A Declaration on a Leading Order.

To the Barons of the Exchequer of the Term of St. Hillary, in the 28th Year of the Reign of King George the Second, now of Great Britain, and so forth, and in the Year of our Lord 1755.

County C. D.
Cousi t.

I. K. Debtor of our Lord the King, comes before the Barons of this Exchequer the 12th Day of *February*, in this Term, by *J. R.* his Attorney, and complains by his Bill against *W. F.* Esq; present here in Court, the same Day by *G. E. H.* his Attorney, of a Plea of Trespass on the Case, for that Whereas on the 3d Day of *February* 1755, at the Parish of *St. Michael* the Arch Angel, in the Ward of *St. Michael*, in the County of the said City, a certain Discourse was had and arose between the said *I. K.* and *W. F.* concerning the Kindred between the said *W. H.* and *J. W.* both deceased, and both mentioned in the Pleadings, and in an Order bearing Date the 3d Day of *February* aforesaid, in the Year of our Lord 1755 aforesaid, in two Causes depending in the Chancery Side of this honourable Court, in one whereof the said *W. F.* was Plaintiff, and the said *I. K.* and *R. D.* are Defendants, and in the other whereof the said *I. K.* is Plaintiff, and the said

ſaid *W. F.* and *R. D.* are Defendants, upon which Diſcourſe ſo as aforeſaid, had a Queſtion aroſe between the ſaid *I. K.* and *W. F.* whether *W. H.* in the Pleadings mentioned was of Kin in any and what Degree to *J. W.* in the Pleadings alſo mentioned. And it was then and there agreed between the ſaid *I. K.* and *W. F.* in Conſideration that the ſaid *I. K.* then and there at the ſpecial Inſtance and Requeſt of the ſaid *W. F.* had paid unto the ſaid *W. F.* the Sum of 10*s.* Sterling, that the ſaid *W. F.* then and there undertook and faithfully promiſed to the ſaid *I. K.* that he the ſaid *W. F.* would when he ſhould be afterwards thereunto required pay unto the ſaid *I. K.* the Sum of 40*s.* if the ſaid *W. H.* was of Kin to the ſaid *J. W.* and the ſaid *I. K.* in Fact ſaith that the ſaid *W. H.* was of Kin to the ſaid *J. W.* Nevertheless the ſaid *W. F.* not regarding his ſaid Promiſe, Undertaking and Agreement ſo as aforeſaid made, but contriving and fraudulently intending to deceive and defraud the ſaid *I. K.* in this Particular did not pay the ſaid 40*s.* or any Part thereof to the ſaid *I. K.* altho' the ſaid *W. F.* was afterwards, *to wit*, on the 4th Day of *February* aforeſaid, at the Pariſh and Ward aforeſaid, and County of the ſaid City aforeſaid, thereunto by the ſaid *I. K.* requeſted, but to pay the ſaid Sum reſuſed, and ſtill doth reſuſe ſo to do, to the Damage of the ſaid *I. K.* of 100*l.* Sterling;

ing, which renders the said *I. K.* the less able, &c.

Pledges, &c.

Of the Tales, and Tales de Circumstantibus.

Tales, what.

IF upon the Day of Trial, the Jury impaneled do not all appear; or if they do appear, but fall short by Challenges, the Court can supply the Number that is wanting to make the Inquest full. And this at the Common Law was by Writ of *Decem Tales*, *octo Tales*, &c. (out of the King's Courts) one of them after another, as there was Need until there was a full Jury.

Tales de Circumstantibus.

But now by the aforefaid Statute 10 *Cha.* 1. ch. 13. Upon all Trials before Justices of Assize or *Nisi Prius* (for upon Trials at Bar the Law is as it was before) where a full Jury do not appear, or fall short by Challenges, the Sheriff or other returning Officer in all Actions, at the Request of the Party and by Directions of the Court, is instantly to return a *Tales* of the Persons then present, and the Court may fine such as do not appear, or after appearing withdraw themselves, &c. as is before directed in Page 191, But note, that in all Cases, the *Tales* is to be applied for by the Council for the Party for whom it is requested.

So

So that of *Tales* there are two Sorts, Two Sorts of Tales. i. e. *Tales de Circumstantibus*, and a *decem Tales*. *Tales de Circumstantibus* is where a full Jury do not appear at the *Nisi prius*, or so many are challenged that there is not a full Jury; then on the Prayer of the Plaintiff's Council, or Attorney, the Judge will grant this *Tales*, which the Sheriff returns immediately in Court: A *decem Tales*, is when a full Jury doth not appear at a Trial at Bar; and is a Writ to the Sheriff *Apponere decem Tales*. 10 Rep. 102. Finch, 414. 2 Roll. Abr. 67.

Upon a Trial at Bar, if the Jury do not appear full, the Court cannot grant a *Tales de Circumstantibus*, but will grant a *decem Tales*, returnable in some convenient Time in the same Term, to try the Cause. 2 Lill. Abr. 552. But note, there must be fifteen Days between the Teste and Return of the Wait of *decem Tales*. No Tales de Circumstantibus on a Trial at Bar.

The Sheriff may return twenty-four, forty, or any Number upon the *Tales de Circumstantibus*; and it may be prayed by Attorney, (altho' the Statute doth not mention an Attorney) as well as in proper Person. *Trials per Pais*, 63. What Number the Sheriffs may return upon the Tales de Circumstantibus.

And upon the *Tales de Circumstantibus*, the Sheriff may impanel a Priest, or Deacon, What Persons he may return thereon.

con, if he hath sufficient Freehold of Lay Fee; but not an Infant, or one above the Age of seventy Years. And he may also impanel Coroners, Capital Ministers of any Corporation, Foresters, Men blind, mute, if they have their Understanding, (but not deaf Men) excommunicated Persons, but not outlawed, or Attaint, not Aliens, nor Clerks attainted, nor Persons attainted of false Verdicts. *Trials per Pais*, 64.

No Challenge to the Array of the *Tales de Circumstantibus*.

It seems by the Statute, that none of the Parties can challenge the Array of the *Tales de Circumstantibus*, but only to the Poll. *Ibidem*.

After Challenge to the Poll tried, no further Challenge to the same Poll.

And after a Challenge to the Poll tried, there shall be no other Challenge to the same Poll, for any Cause or Matter that is at the same Time. *Ibidem*.

For Challenges, See the Title Challenge.

Death of a Juror after impanelled a *Tales* to issue.

If a Juror die after he is impanelled, a *Tales* shall issue, not a new *Venire facias*. *Trials per Pais*, 62.

Tales what Time granted.

It cannot be granted on the Day of the Return of the *Venire facias*, but only on the return of the *Distringas*, because it appears not before such Return but that a full Jury may appear. 3 *Bac. Abr.* 249. *Trials per Pais*, 62.

The Coroners may put the Sheriff on the *Tales*. *Trials per Pais*, 64.

Coroners may put the Sheriff on the *Tales*.

If the *Venire facias* be good, and the *Distingas Juratores* ill, if the Panel be affirmed, yet the *Tales* is void: For in effect there is only a *Venire facias* returned, and then no *Tales*. *Ibid.* 62.

Tales when void.

If the Defendant hath a *Distingas* with a *Proviso*, yet the *Tales* ought not to be granted with a *Proviso* at the Defendant's Request, before a Default in the Request of a *Tales* in the Plaintiff. *Ibid.* 62.

Tales with a *Proviso*.

If two Coroners or Essofors return the Panel, one of them cannot return the *Tales*, &c. *Ibid.* 63.

Two Coroners or Essofors returning the Panel one cannot return the *Tales*.

If the Defendant sue the Writ of *Nisi prius* by *Proviso*, yet the Plaintiff may have a *Tales*, &c. *Ibid.* 63.

Nisi prius by *Proviso*, Plaintiff may have a *Tales*.

Lord Coke in his 10th Report 104. saith that at common Law in the granting of a *Tales* five Things are to be considered.

Five Things to be considered in granting a *Tales*.

- I. The Time of granting, &c. thereof.
- II. The Number of the *Tales*.
- III. The Order of them.
- IV. The Manner of Trial.

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V. The

V. The Quality of them is to be considered.

As to the first, four Things are to be considered.

To be granted on Default of the principal Panel.

I. That the Time of granting them is upon Default of so many of the principal Panel that there cannot be a full Inquest.

That the principal Panel stand at the Time of granting the *Tales*.

II. That at the Time of granting them the principal Array stand, for *Tales* are Words similitudinary, and have Reference to the Resemblance which then ought to be in *Esse*; and therefore if the Array be quashed, or all the Polls challenged and tried out, no *Tales* shall be awarded, for then there are not *Quales*, but in such Case a new *Venire* shall be awarded. But if at the Time of granting the *Tales*, the principal Panel stands, and afterwards is quashed as is aforesaid, yet the *Tales* shall stand, for it sufficeth if there were *Quales* at the Time of granting the *Tales*.

Defendant cannot pray it till Plaintiff makes Default.

III. It is observed that he who is merely Defendant cannot pray a *Tales* till the Plaintiff hath made Default.

After a full Jury appears or after impanelled and before they appear a *Tales* shall be granted.

IV. In some Cases a *Tales* shall be granted after a full Jury appear and is sworn; as if a Jury be charged, and afterwards before a Verdict given in Court one of them dye, a *Tales* shall be award-

ed, and no new *Venire facias*. And if any of the Jurors impanelled dye before they appear, and this appears by the Sheriff's Return, the Panel shall not abate, but if there be Need, a *Tales* shall be awarded; and the Time for Challenge and Trial of the *Tales*, is, after the principal Panel is tried; and if the principal Panel be affirmed, the same Triors shall try the *Tales*; but if it be quashed, then the two Triors of the principal shall not try the *Tales*.

As to the second (*to wit*) the Number two Things are to be observed.

I. That in all Cases, the *Tales* ought to be under the Number of the Principal in the *Venire facias*, (unless in Appeals) and the Reason wherefore more than the Number may be granted in Appeals of the Plaintiff's Part is, because the Defendant may challenge peremptorily, and if Default be in the Plaintiff, then the Defendant may pray a *Tales*; and the Reason is in *Favorem vitæ*, and that he may expedite and free himself from Vexation and the Question of his Life for fear his Witnesses should dye.

The *Tales* to be under the Number of the principal.

II. That the Number ought always to be certain, as Ten, Eight, Six, or four, &c. But by the said recited Statute of 10 Cha. 1. a *Tales de Circumstan-*

The Number to be certain.

tibus may be granted on Trials by Affize and *Nisi prius* as well of an uncertain as a certain Number; and that by Force of these Words in the Statute (*viz.*) *so many, &c. as shall make a full Jury.*

The Order.

III. As to the third (*to wit*) the Order, it is to be known.

That always in every new *Tales*, the Number shall be diminished, as if the first be ten, the second shall be eight, and so always less. But if the *Tales* awarded be quashed by Challenge, you may have another of the same Number.

The Manner.

IV. As to the fourth (*to wit*) the Manner of Trial.

That is commonly by them with others, and by them only, when after granting the *Tales* the principal Panel is quashed, then the Trial shall be only by the *Tales*; or if the *Tales* do not amount to a full Inquest, another *Tales* to supply the former may be granted.

The Quality.

V. As to the fifth (*to wit*) the Quality of the *Tales*.

They ought to be of the same Quality as the *Quales* or principal are; and therefore, if the first be *per Medietatem Linguae* of *Englisb* and Aliens, so ought the
the

the *Tales* to be; so if the principal be out of Liberty; so if the *Venire facias* be directed to the Coroners, so ought the *Tales*; and all Things which are required by Law in the *Quales* are required in the *Tales*.

Where a Juror is withdrawn, when the Plaintiff intends to bring the Cause to Trial again, he may have a *Disstringas*, &c. with a *decem Tales*. *Trials per Pais*, 68.

Juror withdrawn
Plaintiff may
have a *Disstringas*
decem Tales.

Of Challenges to Jurors.

UPON the Day of Trial, if a full Challenge. Jury appears, and that either Party shall apprehend that they or any of them are not as indifferent as Jurors ought to be, he is at Liberty to except to them, and this is what in our Law is called Challenge, which is derived from the old *French* Word *Caloir* or *Chaloir*, which in one Signification, is to care for or foresee; and for that to challenge Jurors, is in the mean to care for, or foresee that an indifferent Trial be had: And it is *Calumniare* to challenge, that is to except against them that are returned to the Jurors and this is its proper Signification. 1 *Inst* 155.

Challenge two
Fold.

A Challenge to Jurors is two Fold, either to the Array, or to the Polls ; to the Array of the principal Panel and to the Array of the *Tales*. A Challenge to the Array of the Panel, is at once to challenge or except against all the Persons so arrayed or impanelled, in Respect to the Partiality or Default of the Sheriff, Coroner, or other Officer that made the Return. Challenge to the Polls is, when some one, or more is excepted against as not indifferent, or Persons in Law meet to try the same. And note, there is a principal Cause of Challenge to the Array and a Challenge to the Favour. And of Challenges to the Polls, at the common Law there were four Kinds (that is to say) peremptory, principal, which induces Favour, and for Default of Hundredors ; but by the Statute 6 *Ann.* ch. 10. Challenges to the Array of the Panels of Jurors, or to the Polls for Default of Hundredors are taken away, and the *Venire facias* shall be awarded of the Body of the proper County where such Issue is triable. For much excellent Learning on each of these Kinds of these Kinds of Challenges, See 1 *Inst.* 155, to 158, and *Trials per Pais*, 111, to 148.

Challenge to the
Polls after Chal-
lenge to the Ar-
ray but not a
Converso.

If the Challenge to the Array be found against the Party that takes it, yet he shall have his particular Challenge to the Polls ; but after either Party hath taken Challenge to the Polls, he cannot

not challenge the Array. *Trials per Pais*,
120 to 148.

If the Defendant challenge the Array, which is found against him; or he release the Challenge and the Array be affirmed, and afterwards he challenge a Juror, he ought to shew the Cause presently. *Ibid.* 134.

In what Case he
that Challenges
ought to shew
Cause presently.

But if there be two Defendants, and one Challenge the Array, and afterwards both challenge a Juror, the other shall not shew Cause presently. *Ibid.*

Ibidem.

If a Juror be challenged, and there be enough of the Panel besides, the Cause of Challenge need not be shewed unless the other Side challenges *Touts paravail*. *Ibid.*

Ibidem.

If any of the Jurors be sworn, and there be not sufficient, for which a *Tales* is granted, and at the Return, one of the premier Jurors is challenged, the Cause ought to be shewed presently, he being sworn before. *Ibid.*

Ibidem.

If one Party challenge the Array which is affirmed, and afterwards challenge a Juror, he ought to shew Cause presently, and this shall be tried presently; but otherwise of the other, who did not take challenge to the Array; and the Challenge of him who shall be

Trial, Triors
and Challenge.

first challenged shall be first tried. *Ibid.*
135.

Ibidem.

If the Array be challenged, the Court to try the Array may choose two Triors to try the Array according to their Discretion. *Ibid.*

Ibidem.

If an Action be depending between the Juror and one of the Parties, and for this he is challenged; and the other says that this is brought by Covin, the Triors may try this; for although the Action is of Record, yet the Covin is not. *Ibid.* 136.

Challenge and Evidence.

The Juror may be examined upon *Voire Dire* to any Challenge that is not to his Dishonour; but the Triors are not bound by his Oath. *Trials per Pais*, 136.

The Triors after sworn by Consent may go at large.

The Triors after they are sworn may go at large by Assent of the Parties, until another Day. *Ibid.*

Challenge against the Sheriff, Process to the Coroners.

Cause against the Coroners, Process to the Elisors.

If the Plaintiff allege a Cause of Challenge against the Sheriff, the Process shall be directed to the Coroners; if any Cause against any of the Coroners, Process shall be awarded to the rest; if against all of them, then the Court shall appoint certain Elisors or Eslisors (so named *ab Eligendo*) because they are named by the Court, against whose Return, no Challenge shall be taken to the
the

the Array, because they were appointed by the Court; but he may have his Challenge to the Polls. *Ibid.* 143.

Note, if Process be once awarded for the Partiality of the Sheriff, though there be a new Sheriff, yet Process shall never be awarded to him; for the Entry is, *ita quod Vice-comes se non intromittat*; but otherwise it is, for that he was Tenant to either Party, or the like. *Ibid.*

Process once awarded for Partiality of the Sheriff, never to be awarded to him tho' there be a new Sheriff, otherwise, if he was Tenant to either Party.

If the Array be challenged in Court, it shall be tried by two of them that be impanelled, to be appointed by the Court: For the Triers in that Case shall not exceed the Number of two unless it be by Consent. But when the Court names two for some special Cause alleged by either Party, the Court may name others; if the Array be quashed, then Process shall be awarded *ut supra*. *Ibid.*

Array challenged in Court how to be tried.

If there be a Demurrer to a Challenge, the Judge before whom the Cause is to be tried, may determine it, or adjourn it to be heard another Time. *Trials per Pais*, 144. *Stiles*, 464. *Vide Bulstr.* 1 part, 114.

Demurrer to a Challenge how determinable.

If a Panel upon a *Venire facias* be returned and a *Tales*, and the Array of the Principal be challenged, the Triers which try and quash the Array shall not try the Array of the *Tales*; for now it is

The Triers who try and quash the Array of the principal Panel shall not try the Array of the *Tales*.

Otherwise, if they affirm the Array of the principal Panel.

is as if there had been no Appearance of the principal Panel; but if the Triors affirm the Array of the Principal, then they shall try the Array of the *Tales*. 1 *Inst.* 158. *Trials per Pais*, 144.

Plaintiff challenging the Array of the principal and Defendant, the Array of the *Tales* now it shall be tried.

If the Plaintiff challenge the Array of the Principal, and the Defendant the Array of the *Tales*, there, the one of the Principal and the other of the *Tales* shall try both Arrays. *Trials per Pais*, 144.

Challenge to the Polls two Triors.

When any Challenge is made to the Polls, two Triors shall be appointed by the Court; and if they try one indifferent and he be sworn, then he and the two Triors shall try another; and if another be tried indifferent, and he be sworn, then the two Triors cease, and the two that be sworn on the Jury shall try the rest. 1 *Inst.* 158.

Trials of Challenge to Jurors after some of them are sworn, and where the first or second Man is challenged.

If any of the Jury after some of them be sworn be challenged, those that are sworn are to say whether he that is challenged be indifferent or not. But if the first or second Man be challenged then the Court doth use to appoint some of them that shall be afterwards sworn to try the Indifferency of the Person challenged, and the following general Rules concerning Challenges are to be observed.

I. All Challenges must be taken before the Jurors are sworn. Rules concerning Challenges.

II. If one challenge a Juror and it be found against the Challenger, he may not challenge the Juror for the second Cause.

III. If one challenge the Array and it be found against him, he may not afterwards challenge any of the Polls without shewing Cause presently.

IV. No Challenge shall be admitted against the Triors appointed by the Court. *Ibid.* 145.

If the Plaintiff challenge ten, and the Defendant one, and the twelfth is sworn, because one cannot try alone, there shall be added to him one challenged by the Plaintiff and the other by the Defendant. *Ibid.*

Trial of Challenges where the Plaintiff challenges ten and the Defendant one and the twelfth is sworn.

If the Cause of Challenge touch the Dishonour or Discredit of the Juror he shall not be examined upon his Oath; but in other Cases he shall be examined upon his Oath to inform the Triors. *Ibid.*

Juror not to be examined upon Oath if challenged touching his Dishonour.

If the Defendant do not appear at the Trial when he is called, he loseth his Challenge to the Jurors, altho' he doth after-

Challenge lost if Defendant doth not appear at the Trial when called.

afterwards appear. *Ibid.* 146. 1 *Lill. Abr.* 259.

Venire facias to
the Coroners.

If the Defendant may have a principal Cause of challenge to the Array if the Sheriff return the Jury, the Plaintiff in that Case, may for his own Expedition allege the same, and pray Process to the Coroners; which he cannot have, unless the Defendant will confess it, but if the Defendant will not confess it, then the Plaintiff shall have a *Venire facias* to the Sheriff, and the Defendant shall never take any Challenge for that Cause; and so in like Cases. But on the Part of the Defendant, any such Matter shall not be alleged and Process prayed to the Coroners, because he may challenge the Jurors for that Cause, and can be at no Prejudice. *Trials per Pais*, 139.

Principal Challenge why so called.

Principal, so called because if it be found true, it standeth sufficient of it self without leaving any Thing to the Conscience or Discretion of the Triers. 1 *Inst.* 156.

When a Peer is a Party a Knight is to be returned of the Jury or the Array may be challenged.

If a Peer of the Realm or Lord of Parliament be Plaintiff or Defendant, there must be a Knight returned of his Jury, be the Lord Spiritual or Temporal, or else the Array may be quashed. But if he be returned, altho' he appear not, yet the Jury may be taken of the Residue; and if others be joined with
the

the Lord of Parliament, yet if there be not a Knight returned, the Array shall be quashed against all. *Trials per Pais*, ch. 9. fo. 118.

This Challenge may be taken by the Peer, but not by the other Party who is not a Peer; for it is only the Privilege of a Peer. *Mod. Rep.* 226.

But this Challenge to be only by the Peer.

If upon a Trial between a Peer and a common Person, the Sheriff does not return a Knight as he ought, yet if the Array is not challenged, and a Verdict is given, it shall be good; for this is a Privilege only which the Law gives him, and which he may waive if he please. 1 *Roll. Abr.* 781. Lord *Powis* and *Hickman*.

If the Peer neglects to Challenge for Want of a Knight, and there be a Verdict it shall be good.

It hath been settled that the Lessor of the Plaintiff being a Nobleman, it was no Cause of Challenge to the Array, that a Knight was not returned, tho' there be an Averment that the Ejectment is brought to try the Peer's Title, because the Lessor does not appear as a Party to the Record. 3 *Bacon. Abr.* 262.

On a Trial in Ejectment no Cause of Challenge that a Knight is not returned tho' the Lessor of the Plaintiff be a Peer.

De Inquisitionibus. 33 *Ed. 1. Eng.* If one challengeth a Juror for the King, he shall forthwith assign the Cause, which shall be presently tried by the Discretion of the Justices.

Challenge of a Juror for the King.

If

If he allege not a good Cause, or it go against him, the Inquest shall be forthwith taken.

In what Cases
Consanguinity
shall be no prin-
cipal Challenge.

By *Hen.* 8. ch. 4. Consanguinity or Affinity within the fifth Degree betwixt a Juror impaneled or his Wife, and any of the Parties to the Trial, or the Wife of any of them; or betwixt the Sheriff, under Sheriff, Coroner, or other Officer returning the Jury, or the Wife of any of them, and any of the Parties to the Trial or Inquest, or the Wife of any of them, shall be no principal Challenge.

Some Rules of Law concerning Jurors.

Jurors must be
Probi & Legales
homines.

THE Law takes care, that all Jurors must consist of such Persons, as, are *Probi & Legales Homines*, lawfully impanelled and returned by the Sheriff or other sufficient Officer.

Petit Jury must
all agree.

In the petit Jury, every Man of the twelve must agree in all Trials before they can give a Verdict.

Jurors may be
punished by a
Judgment in
Attaint if they
give a false
Verdict.

Jurors may be punished by a Judgment in Attaint, if they give a false Verdict in any Court of Record, either in a real or personal Action, where the Debt or Damages is above 40*s.* But no more Witnesses must be produced to the

the Jury which is to try the Attaint than what gave Evidence to the first Jury : And if it should appear that the first Jury had plain and positive Proof before them, tho' false, yet the Jury which tries the Attaint is not to consider that falsity, but what they would have done themselves if they had been on the first Jury. *Dyer*, 53. *Vide Westm.* 1 *Cap.* 38. p. *Stat. de Attinēdis*, 13 *Ed.* 2. p. 1 *Ed.* 3. ch. 6. p. 5 *Ed.* 3. ch. 6. p. 5 *Ed.* 3. ch. 7. p. 28 *Ed.* 3. ch. 8. p. 34 *Ed.* 3. ch. 7. p. 9 *R.* 2. ch. 3. p. 11 *H.* 6. ch. 4. p.

Any Person who is injured by a false Verdict may have a Writ of Attaint against the Jury, unless where the King alone is Party against a Subject for there if the Jury find for him tho' falsely, yet no Attaint lies in such Case ; but 'tis otherwise, where the Suit is *tam pro Domino Rege quam pro se ipso*. 4 *Leon.* 46.

Writ of Attaint
for a false Ver-
dict.

A Jury cannot be fined for giving a Verdict contrary to Evidence where an Attaint lies against them ; nor indeed where it doth not lie ; because it is impossible for the Judge to know the Fact as the Jury may ; for the Judge knows it no otherwise but by the Evidence given in Court, but the Jury are supposed to know it by other Methods ; as by being returned of the Vicinage, by their own personal Knowledge, may know the Witnesses to be Persons of no Credit.

Jury not finable
for giving a Ver-
dict contrary to
Evidence.

So

so that if the Judge cannot have so much Evidence of the Fact as the Jury may, they cannot go against his Direction in Law, because where the Fact is not agreed he cannot direct what is Law. *Vide Vaugh.* 147. *Busbell's Case*. This Case is well worth Reading and Observation. *Vide Etiam*, 3 *Leon*. 207.

A Juryman may be fined for Obstinacy and for departing.

If a Juryman will keep his Fellows without giving any Reason, or will withdraw from them, he may be committed and fined; because he is sworn well and truly to try the Issue, and therefore to be obstinate without Cause, or to depart, is a Misdemeanour.

Not for differing in Judgment.

But if he differs in Judgment from the rest, tho' his Dissent be not as reasonable as the Opinion of those who agree, and tho' he keep the rest for a Time from giving their Verdict, yet he cannot be fined. *Nels. Just' Peace* 375.

Fineable for Misdemeanours.

For Misdemeanours they may be fined, but not barely for going against the Direction of the Court. *N. J. P.* 375.

Ibidem.

So in *Bayne's Case*, where the Jury agreed for two Verdicts, intending to conceal one if the Court should be satisfied with the other. *Cro. Eliz.* 778.

Ibidem.

So if they cast Lots whether to find for one or the other, it is a Misdemeanour. 2 *Lev.* 140, 205.

If

If they eat or drink before or after they are agreed of their Verdict they are to be fined, only with this Difference, that if they eat at their own Charge the Verdict shall stand; but if at the Charge of the Party it shall be set aside. *Dyer*, 137. 1 *Leon*. 133. Ibidem.

Jurors have been fined for having Figs and Pippins in their Pockets, tho' they did not eat them. 1 *Leon*. 133. *Moor*, 599. Ibidem.

But the Court may give the Jury Leave to eat some small Matter, and drink at the Bar after some Evidence is given to them, if the Plaintiff and Defendant will consent unto it; but by the Law of *England* they may not eat or drink out of the Court, nor have Fire or Candle. 2 *Lill. Reg.* 25. *Trials per Pais*, 310. 1 *Inst.* 228. Ibidem.

If after they are gone from the Bar, one of the Jury calls a Witness who was sworn, and had given his Evidence in Court, and desires him to repeat it again which he did, this is a Misdemeanour and the Verdict shall be set aside. *Cro. Eliz.* 189. Verdict set aside for a Witness repeating his Evidence to the Jury after they had left the Bar.

If a Juror departs after he is sworn, he shall be fined and imprisoned, and by Consent of Parties another Juror may be sworn. *Trials per Pais*, 320. Juror departs and another sworn by Consent.

Attorney directing a Sheriff in returning a Jury.

An Attorney was turned over the Bar for giving Directions to the Sheriff, what Persons he would have returned of a Jury. *Moor*, 882.

Juror withdrawn Parties to be at equal Charges.

A Juror may be withdrawn, by Consent of the Parties, but in such Case they are to be at equal Charges for the Jury.

Who are to be exempted from Juries.

By the Stat. *West.* 2 *Cha.* 38. p. old Men above the Age of seventy, or sick or diseased at the Time of the Summons, or not dwelling in the County shall not be put on Juries.

Ibidem.

Barons and all above them in Degree, Tenants in antient Demefne, Councils, Attornies, Bailiffs, Coroners, Stewards, or any Servants of theirs, Clerks, and other Ministers, of the King's Courts, Officers of the Sheriff, Infants under the Age of fourteen Years, and such as are exempted by the King's * Charter, are not to serve on Juries. *Trials per Pais*, 75, 76. Also Clergymen are exempted.

* *Marlbr. Cap.*
14 P.

It is said in (*Compl. Sher.* 199.) That Action on the Case lies against the Sheriff, for returning upon a Jury a Person exempt.

Privilege of Exemption when and how to be claimed. *Ibid.* 198.

Jurors ought to be *Probi et Legales homines*, not outlawed, not such as have lost *Liberam Legem*, or become infamous, as Persons attainted of Felony, false Verdict, Conspiracy, Perjury, Præmunire, Forgery; not such as have had Judgment to lose their Ears, stand on the Pillory or Tumbrel, or have been stigmatized or branded, nor Infidels, neither can any such be Witnesses. *Trials per Pais*, 74, 75.

Jurors ought to be *Probi & Legales homines*, not outlawed.

Several further Statutes relating to Jurors.

BY Stat. *Westm.* 2. 13 *Ed.* 1. ch. 38 *Eng.* in one Assize no more shall be summoned than twenty-four, and old Men above seventy Years; and such as be sick at the Time of the Summons, or not dwelling in that Country, shall not be put in Juries or petty Assizes; and if such Assizes and Juries be taken out of the Shire none shall pass in them but those that may dispend 40s. yearly at least, except such as be Witnesses in Writings, neither shall this Statute extend to great Assizes; and if the Sheriff or Bailiffs offend in any Point of this Statute and thereupon be Convict, Damages shall be awarded to the Parties grieved, and they shall nevertheless be amerced to the King; and Justices as-

No more than twenty-four Jurors to be summoned in one Assize. And what Persons shall be put on Juries and who shall be exempt.

signed to take Assizes shall have Power to hear Plaints as to the Articles in this Statute.

None to be impanelled except he hath 40s. *per Annum* Lands out of his proper County.

By Stat. *De iis qui ponend.* &c. 21 *Ed.*
 1 Stat. 1. no Sheriff nor Bailiff shall put in any Recognizance that shall pass out of their proper Bailiwicks any, except they have Lands to the yearly Value of an 100s. at least. And this Statute shall not restrain the last Statute of *Westminster*, ch. 38. so that within the County before Justices of the King assigned to the taking of Inquests or other Recognizances, none shall be impanelled except he have Lands to the yearly Value of 40s. and likewise saving, that before Justices errant, and also in Cities, Boroughs, and other Market Towns, it shall be done as it hath been accustomed.

Not to extend to Juries in Corporations.

Juries impanelled must be of the Neighbourhood, and sufficient and in Default Penalty on the Officer.

By *Eng. Stat. Artic. super Chart.*
 28 *Ed.* 1. Stat. 3. ch. 9. no Sheriff nor Bailiff shall impanel in Juries too many Persons, nor otherwise than is ordained by the Statute; and they shall put in the Jury such as be next Neighbours, most sufficient, and least suspicious; and he that otherwise doth, and is attainted thereupon, shall pay the Plaintiff his Damages double, and be grievously amerced to the King.

By

By *Eng. Stat. Ordin. for Inquests*,
 33 *Edw. 1. Stat. 4.* of Inquests to be
 taken wherein the King is Party, not-
 withstanding it be alleged that the Ju-
 rors or some of them be not indifferent
 for the King, yet such Inquests shall not
 remain untaken for that Cause; but if
 they that sue for the King, will chal-
 lenge any of those Jurors they shall assign
 a Cause, and the Truth of the Chal-
 lenge shall be enquired of.

Inquests wherein
 the King is Par-
 ty how to be ta-
 ken if it be al-
 leged that some
 of the Jurors are
 not indifferent.

By *Eng. Stat. 34 Edw. 3. ch. 4.*
 Panels shall be made of the next Peo-
 ple not suspected nor procured; and the
 Sheriffs, Coroners and other Ministers,
 which do against the same shall be pu-
 nished before the Justices take the In-
 quest according to their Trespass, as
 well against the King, as against the
 Party.

Penalty on She-
 riffs making Pa-
 nels of suspected
 Jurors.

By *Eng. Stat. 34 Edw. 3. ch. 8.* in
 every Plea, whereof the Inquest or
 Assize doth pass, if any of the Parties
 will sue against any of the Jurors that
 they have taken of his Adversary or of
 him for their Verdict, he shall have his
 Plaint by Bill presently before the Jus-
 tices before whom they did swear; and
 if the Juror plead to the Country, the
 Inquest shall be taken forthwith; and
 if any other than the Party will sue for
 the King against the Juror, it shall be
 heard; and if the Jurors be attainted
 at the Suit of other than the Party, he

Jurors accused,
 &c. of Bribery
 to be tried in-
 stantly.

that sueth shall have half the Fine, and the Parties to the Plea shall recover their Damages by the taxing of the Inquest; and the Juror so attainted shall have Imprisonment one Year, which shall not be pardoned; and if the Party will sue by Writ before other Justices, he shall have the Suit in the Form aforesaid.

Penalty, &c. on
Juror taking any
Thing, &c. to
give his Verdict.

By *Eng. Stat. 38 Edw. 3 Stat. 1. ch. 12.* if any Jurors do take any Thing of the Plaintiff or Defendant to say their Verdict, and thereof be attainted by the Process contained in *Stat. 34 Edw. 3. ch. 8.* be it at the Suit of the Party that will sue for himself, or for the King, or for the Suit of any other, every of the Jurors shall pay ten times as much as he hath taken; and he that will sue shall have the one half, and the King the other; and all Imbraceors to procure such Inquests for Gain shall be punished as the Jurors, or if the Juror or Imbraceor have not wherefore to make Gree, he shall have Imprisonment for one Year; and no Justice or other Minister shall inquire of Office upon the Points of this Article but only at the Suit of the Party, or of other.

Qualification of
Jurors on Trial
of the Death of
a Man or in any
Plea, &c. where
the Debt a-
mounts to forty
Marks.

By *Eng. Stat. 2 Hen. 5. Stat. 2. ch. 3.* no Person shall pass in any Inquest upon Trial of the Death of a Man, nor betwixt Party and Party in Plea real or personal, whereof the Debt or Damage amounts

amounts to forty Marks, if he have not Lands of the yearly Value of 40*s.* so that it be challenged by the Party.

By Stat. 7 *Hen.* 6. ch. 1. In Inquests to be taken between the King and the Party, and the Lords of Franchises and the Party, or between Party and Party, in the Courts of the King, or of any Lord of Franchise, Additions of their Estate, or of their Mystery, or of their Places, shall be put in the Panels of the said Inquests; and if the Sheriffs or other Ministers which have Return of Writs do the contrary they shall be amerced, and their Amerciaments shall be assessed and affeered by the Discretion of the Judges before whom the said Writs are returned.

Additions, &c. of Jurors impanelled on Inquests to be inserted in the grand Panel.

By Stat. 33 *Hen.* 8. Seff. 1. ch. 4. Consanguinity or Affinity being not within the fifth Degree betwixt the Juror impanelled in any inquest or Trial, or his Wife, or any of the Parties to the same, or any the Wife of the same Parties, or betwixt the Sheriffs, Under-Sheriffs, Coroners, or other Officers that shall return or array any Panel or Jury in any Inquest or Trial, or the Wife of any of them, and any of the Parties to the same, or the Wife of any of the same Parties, shall be no principal Challenge.

What Degrees of Consanguinity &c. may be Cause of Objection to a Juror.

Papists not to be Jurors, but where a sufficient Number of Protestants cannot be found.

By Stat. 6 *An.* ch. 6. sect. 5. No Papist shall serve or be returned on any Grand Jury in the *Queen's-Bench*, or before Justices of Assize, Oyer and Terminer, or Gaol Delivery, or Quarter-Sessions, unless it shall appear to the Justices that a sufficient Number of Protestants cannot be then had for that Service; and in all Trials of Issues on any Presentment, Indictment, Information, or Action on any of the Statutes mentioned in this Act, it shall be lawful for the Prosecutor or Plaintiff to challenge any Papist returned as Juror to try the same, which Challenge the Judges shall allow.

Special Jury.

Special Jury what and in what Cases.

The Manner of returning and impanelling a special Jury.

W Here either Party apprehends that an indifferent or impartial Jury will not be returned by the Sheriff; in such Case, the Court will, upon Council's Motion, (if it appears to them by Affidavit that there is sufficient Reason) order that the Sheriff, or other Officer, shall return the general grand Panel, or Book of Freeholders of the County, to the Officer of the Court, who in presence of Attornies on both Sides, is to take thereout the Names of forty eight Persons, from which each Attorney shall strike out twelve, and the remaining twenty four shall be impanelled by the Sheriff to try the Issue; and this is what the

the Law calls a *Special Jury*, and a Special Jury may also be by Consent of Parties. 2 *Lill. Abr.* 123.

And in a Cause of Consequence to be tried at the Bar, the Court will make a Rule for the Officer of this Court to name forty eight Freeholders, and each Party is to strike out twelve, one at a time, and the Remainder to be the Jury for the Trial.

If either Party's Attorney shall refuse to attend the Officer, he may (on Affidavit of Service of the Rule) proceed *ex parte*, and strike twelve for the Attorney who makes Default.

Attorney refusing to attend.

It has been adjudged, that if a Rule be made for a Special Jury, and it is not expressed that the Officer shall strike forty eight Freeholders, and that each of the Parties shall strike out twelve, in such Case the Officer may strike the twenty four, and neither of the Parties strike out any. 1 *Salk.* 405.

Rule if in the general, the Officer to strike twenty-four.

A Special Jury may be granted to try a Cause at Bar without Consent of Parties, but never at the *Nisi Prius*, unless good and sufficient Cause be shewn by Affidavit.

Special Jury on a Trial at Bar without Consent, but not at *Nisi prius*.

The Charge of striking a Special Jury is to be paid by the Party who moves for

The Charge of this Jury by whom to be paid.

for it; but all the Charges, as far as reasonable, must be allowed.

Special Jury seldom granted after a common *Venire* returned and filed.

But note, a Special Jury is seldom granted after a common *Venire* is returned and filed.

Of Evidence, and how Witnesses are to be summoned upon Trials.

Evidence what, and what it contains.

EVIDENCE (*Evidentia*.) This Word in legal Understanding, saith Cook, 1 *Inst.* 283. doth not only contain matters of Record, as Letters Patents, Fines, Recoveries, Enrollments, and the like; and Writings under Seal, as Charters, and Deeds; and other Writings without Seal, as Court Rolls, Accompts, and the like, which are called Evidences, *Instrumenta*. But in a larger Sense it containeth also *Testimonia*, the Testimony of Witnesses and other Proofs to be produced and given to a Jury for finding of any Issue joined between the Parties: And it is called *evidence*, because thereby the Point in Issue is to be made evident to the Jury. *Probationes debent esse Evidentes*, (i. e.) *perspicue & Facile Intelligi*. Trials per Pais, 158.

The different Kinds of Evidence.

And this Evidence (with *Bracton*) we may term *Probatio Duplex*; viz. *Viva*, as Witnesses *Viva Voce*, and *Mortua*, as by Deeds, Writings and Instruments; and *Violenta præsumptio* in many Cases

is

is *Plena Probatio*; and therefore, if all the Witnesses to a Deed be dead, then the Deed shall receive Credit *per Collationem Sigillorum Scripturae*, &c. but especially if there hath been a continual and quiet Possession, which is a violent Presumption; for no Man can keep his Witnesses alive. 1 *Inst.* 6.

A Party interested in a Cause, a Wife for or against her Husband in Civil Cases, Persons attainted of false Verdict, convicted of Perjury or Forgery, of Felony not pardoned, one *non Sanae Memoriae*, an Alien, Infidel, &c. may not be Witnesses; but Kinsmen, tho' never so near, Servants, Masters, and others not infamous, which want not Understanding, and are not Parties in Interest, may be good Witnesses; and also a Jew sworn on the *Old Testament*. It seems agreed, that neither Councils, Attornies, or Sollicitors, are obliged to give Evidence, or to discover such Matters as came to their Knowledge in the Way of their Profession; for by the Duty of their Office they are obliged to conceal their Clients Secrets; were it otherwise, no Person could ever with safety employ a Council, &c. but then they shall declare what they know of their own Knowledge, and with which they were not intrusted by their Client. 2 *Bacon*, 287.

Who may be
Witnesses or not,

It

Juror a Witness.

It is no Exception to a Witness that he is one of the Jurors; but then he is (if called upon) to give his Evidence on Oath openly in Court, and not to be examined privately by his Companions. 2 *Bacon*, 287.

One Witness sufficient at common Law.

It is holden by Lord Chief Justice *Holt*, that at Common Law it was not necessary, in any Case, that a Proof of Matter of Fact should be made by more than one Witness, and that the single Testimony of one credible Witness was sufficient to prove any Fact. 2 *Bacon*, 293.

Bill and Answer, &c. in Chancery, if Evidence.

It has been adjudged that a Bill in *Chancery* should be read as Evidence, tho' it be not binding Evidence; but neither Bill, Answer or Deposition shall be read as Evidence in the Common Law Courts, except in Trials between the same Parties; and even in such Cases, it has been frequently denied. 1 *Salk.* 285, 286, 287. 555.

Subpoena to Witnesses and Attachment for non Attendance.

If upon Trial the Witnesses of the Plaintiff or Defendant will not voluntarily appear without being served with Process, to testify the Truth of their Knowledge in the Matter or Cause in question, then you may have a *Subpoena ad Testificandum* for the said Witnesses, and serve them with a Copy thereof, and if they fail to appear the Court will attach them.

By

By 5 Eliz. ch. 9. *pars.* none served with Process, out of any Court of Record, to testify as a Witness (being tendered convenient Charges, and having no reasonable Let) shall therein make Default, on Pain to forfeit 10*l.* to the Party grieved, and besides to yield to him such further Recompence, as the Judge of the same Court shall think fit, according to the Damage sustained; which said Sums shall be by him recovered in any Court of Record by Action of Debt, in which no Wager, Effoin, &c. shall be allowed.

Further Penalty
of non Attendance.

If there be occasion to have a Prisoner in Prison to be a Witness at a Trial, an *Habeas Corpus* may issue to have him in Court, but at his Charge and Peril who desires it if he escapes; but if this Writ issue to give Liberty to a Prisoner in Execution longer than a Day, 'tis not Law. *Style*, 235.

Habeas Corpus ad Testificandum.

If by any Accident, a Witness is prevented from attending on the Day of Trial, the Court, upon Affidavit thereof, and upon Motion thereon by Council, will put off the Trial; which Affidavit must set out an Expectation of the Witness returning by such a Time; the Defendant himself must swear the Witness is material (absolutely) and without whose Testimony he cannot safely proceed to Trial as he is informed and believes. *Pract. Reg.* 402.

Of putting off a
Trial for Want
of a material
Witness.

When

When a Witness has a settled Residence abroad, Trial not to be put off.

When a Witness has a settled Residence abroad, the Court will not put off the Trial; because in this Case there is no Expectation of his coming at all: But if the Witness should write hither, and promise to come over in a reasonable Time, the Court might consider of it. *Ibidem.*

Exceptions to Witnesses.

Exceptions against Witnesses are, if they gain or lose by the Success of the Cause, or are under any Apprehension or Imagination of gaining or losing. A Witness shan't be admitted to swear in exoneration of himself, but a Witness may swear against himself.

Vaire Dire.

When a Witness gains by the Success of a Cause if it should be for the Party he is produced for, or if he loses, if it goes against him he is produced by, then he is an incompetent Witness: But should the Witness lose if the Party he is examined for succeeds, he is a good Witness, for no Witness can be supposed to have a Temptation to swear contrary to the Truth against his own Interest.

In Debt for Rent on Issue *nil debet* the Statute of Limitation may be given in Evidence; but not in Case on *non Assumpsit*.

In Debt for Rent, upon *nil debet* pleaded, the Statute of Limitation may be given in Evidence, for the Statute has made it no Debt at the Time of the Plea pleaded, the Words of which are in the present Tense; but in case on *non Assumpsit*, the Statute of Limitation hath not

not been given in Evidence, for it speaks of a Time past, and relates to the Time of making the Promise. *Salk.* 278.

So in *Indebitatus Assumpsit*, on Issue So may Infancy on *Indebitatus Assumpsit* on Issue non *Assumpsit*. *non Assumpsit*, Infancy at the Time of the Promise may be given in Evidence. *Ibidem*, 279.

Depositions in *Chancery de bene esse* are good Evidence at Law, where the Witnesses die before Answer. *Ibidem*. Depositions in *Chancery*.

But no Depositions in *perpetuam rei Memoriam*, &c. are Evidence in any Case until after the Death of the Witness who is to appear and give his Evidence *Viva Voce* so long as he lives. *Ibidem*, 286. 555. And in *perpetuam rei memoriam*.

If One makes an Answer in *Chancery* which prejudices his Estate, it may be given in Evidence against him, but not against his Alienee, &c. Answer in *Chancery*.

Also the Matter of a Record may be proved by other Evidence. Matter of Record lost.

Upon *null tiel* Record, a printed Statute was offered in Evidence, but Chief Justice *Holt* said an Act printed by the King's Printers is always allowed good Evidence of the Act to a Jury, but was never allowed to be a Record yet, but if exemplified under the Great Seal, and then A printed Statute may be given in Evidence, but it must be exemplified.

then pleaded, no Man can deny it. *Ibidem*, 566.

The Recital of a Lease in a Release Evidence of such Lease.

At Common Law the Recital of a Lease in a Release was Evidence against the Releasor, and those claiming under him, but not against others without proving there was such a Deed, and that it was lost or destroyed. *Ibidem*, 286. But now by Stat. 9 *Geo.* 2. ch. 5. *pars.*, it is sufficient Evidence of such Lease in all Cases.

A Counter-part of an old Deed lost, or where there is a Fine Evidence.

A Counter-part of a Deed is not sufficient Evidence of an Indenture, without other Circumstances, unless old, or in case of a Fine. *Ibidem*, 287.

A Brewer's Book signed by a Drayman who is dead.

A Brewer's Book signed by a Drayman that was dead, admitted to prove the Delivery of the Beer. *Ibidem*, 285.

So a Shop-book on Proof of the Death of the Servant who made the Entry.

So a Shop-book was admitted as Evidence on Proof of the Servant's Hand who made the Entries, he being dead, and no Proof was required of the Delivery of the Goods. *Ibidem*, 690.

Deeds and Copies of Deeds inrolled.

An Indenture of Bargain and Sale inroll'd may be given in Evidence without proving the Execution: Also Inrolments of Deeds on the Statute are every Day given in Evidence, without Witnesses of the Sealing and Delivery. It has also been held that a sworn Copy of a Deed inroll'd is good Evidence. *Ibidem*, 281.

A Goldsmith's Note to pay is Evidence of his having received the Money. *Ibidem*, 285.

A Goldsmith's Note to pay.

The Heir at Law may be a Witness of the Title, but not the Remainder Man, for he hath a present Estate in the Land, but the Heirship of the Heir is a meer Contingency.

Heir at Law may be Witness of the Title but not a Remainder Man.

§. S. the surviving subscribing Witness of a Bond was made Executor of the Obligee, in an Action brought by §. S. the Executor, upon this Bond, the Court allowed Evidence to prove the Plaintiff's Hand to the Bond, he being disabled himself to give Evidence, as much as if he was dead. See 1 *Williams*, 290.

Surviving Witness to a Bond is made Executor to the Obligee, in an Action brought by him on the Bond, Evidence shall be admitted to prove the Plaintiff's Hand Writing as Proof of the Bond.

In the Case of *Bullen* against *White*, in this Court, *Trin. Term*, 1747, a Motion was made by the Defendant, on several Affidavits, to put off a Trial by *Nisi Prius* 'till the next succeeding Term, but it appearing to the Court, by Affidavits also, that one *James Woods*, one of the Plaintiff's Witnesses, was very aged and infirm, and that the Plaintiff might be in great Danger of losing his Testimony if the Trial should be put off, the Court refused to grant the Motion, unless the Defendant would consent that he should be examined *de Bene Esse*; accordingly he did consent, and thereupon a Rule was conceived for putting

A Motion to put off a Trial refused but on Consent that a Witness that was old and infirm should be examined *de bene Esse*.

off the Trial as desired, and that the Examination of *James Woods*, in behalf of the Plaintiff, should be taken down in Writing by the Clerk of the Pleas-Office of this Court, in the presence of Attornies on both Sides, and the said *James Woods* to be first sworn before the Lord Chief Baron, or one of the other Barons of this Court, and the Defendant's Attorney to have Notice, and to be at Liberty at the same Time to cross-examine the said *Woods*; and such Examination so to be taken, to be read and be conclusive Evidence on the Trial, whether the said *Woods* should be then living or dead, and Defendant to pay Plaintiff the Cost of opposing the Motion. And it was likewise ordered by like Consent, that the Defendant should not bring any Writ of Error, or take any other Advantage on account of the said Consent, or the Proceedings to be had in the said Cause in consequence thereof.

Of the Verdict.

Verdict, what.

WHen the Parties to the Trial have gone through their Evidence, and that the Court have made their Observations to the Jury thereon, and have directed them as seemeth fit, the Jury are then to form their Judgments of the Fact from a Comparison and Consideration of the Proofs and Evidence which have been laid before them; and

and this Judgment (in which every one of the twelve Jurors must agree) is what, in our Law, is called a *Verdict*, in Latin, *Verdictum quasi dictum Veritatis*, [the very Voice of Truth] as it ever ought to be.

And Verdicts are either General or Special; General, when the Jury give their Verdict in general Terms, according to the Issue, as guilty, or not guilty, &c. Special, when they find it at large, according to the Evidence given, and pray the Judgment of the Court as to what the Law is in such Case. Verdicts are likewise Publick and Privy; Publick, when given in open Court; Privy, given out of the Court before any of the Judges thereof; and is called *Privy*, being to be kept secret from the Parties until affirmed in Court; but the Jury may vary from their Privy Verdict, and when they come into Court give a contrary Verdict before recorded, but not afterwards. And a Privy Verdict may be altered in open Court. *Tri. per Pais*, 300. 1 *Inst.* 226, 227. 3 *Inst.*

General and
Special.

Publick and
Privy.

110.

A Verdict must in all Things answer the Issue, or it will be void. But if the Jury find the Issue, and more, it is good for the Issue, and void for the Residue. And where a Jury find a Point in Issue, and a superfluous Matter over and above,

Verdict to answer the Issue but if they find more it will not vitiate the Verdict.

that shall not vitiate the Verdict. 2 *Lev.*
253.

Verdict where
no Issue, there
can be no Judg-
ment, but there
must be a Re-
pleader.

If a Verdict be given where there is
no Issue joined there can be no Judg-
ment given upon such a Verdict, but
there must be a Repleader to bring the
Matter again to Trial: And if a Ver-
dict be ambiguous, insufficient, or un-
certain, Judgment shall not pass on it;
and upon an imperfect Verdict a Jury
shall be summoned to try the Cause af-
resh. *Med. Ch.* 4. *Saund.* 154, 155.

Jury cannot va-
ry from their
Verdict when it
is recorded.

After the Verdict recorded, the Jury
cannot vary from it; but before it is
recorded, they may vary from the first
Offer of their Verdict, and that Verdict
which is recorded shall stand. 1 *Inst.*
227. *Plow. Com.* 212.

Jury shall give
but one Verdict
in the Cause.

The Jury having once given in their
Verdict, altho' it be imperfect, shall ne-
ver be sworn again upon the same Issue,
(unless it be in case of Assize when the
Party is to recover by view of the Ju-
rors,) but there must be a *Venire facias*
de Novo. *Cro.* 2. part, 210.

Verdict against
a Record.

A Verdict found against a Record
which is of a higher Nature than any
Verdict, is a void Verdict; but where
a Verdict may be any way construed to
make it good, it shall be so taken, and
not to make it void. If so much is
found in a Verdict as will serve the
Plain-

Plaintiff's Turn, it is well enough. 1
Lev. 142. 1 *Mod.* 4.

The Jury may give a Verdict without
 Testimony, or against Testimony, when
 they themselves have Conusance of the
 Fact. *Plo. Com.* 86. *Trials per Pais*,
 305.

Verdict without
 or against Testimony.

Where a Verdict is found for the
 Plaintiff and he will not enter it, the
 Defendant on Motion may compel him
 to do it, or the Defendant may enter it
 himself. 2 *Lill.*

Plaintiff not entering his Verdict, Defendant may compel him or Defendant may enter it.

On Return of Verdicts in Civil Cases
 given at the Assizes to the Courts above,
 the Judges there give Judgment for the
 Party for whom the Verdict is found.

The Courts above give Judgment on Verdict at the Assizes.

After a Verdict is returned in Court,
 it cannot be altered or amended; but
 if there be any Misprision, it is to be
 suggested before; and a Mistake of the
 Clerk of the Assizes appearing to the
 Court was ordered to be amended. *Cro.*
Eliz. 112. 150. 1 *Inst.* 217.

In what Cases amendable.

Where a Verdict is certainly given at
 the Trial, and uncertainly returned by
 the Clerk of the Assizes, &c. the *Postea*
 may be amended, upon the Judges certifying the Truth how the Verdict was
 given. *Cro.* 1. part, 138.

Postea amended, how.

In what Cases
a Verdict shall
be set aside.

Where a Verdict is given contrary to Evidence, and the Direction of the Court on the Judges Certificate thereof, and upon Motion of Council and due Notice, it may be set aside. See *Crampton* against *Barker* in this Court in *Michaelmas* Term, 1739.

Ibidem.

A Verdict may be set aside for excessive Damages; but there is no Instance of a Verdict being set aside for smallness of Damages. *Trin.* 7 and 8 *Geo.* 2. *Pract. Reg.* 431.

Ibidem.

If Jurors eat or drink at the Cost of him for whom they give their Verdict, before agreed; if they cast Lotts whether they shall find for the Plaintiff or Defendant; if any Letter, &c. be delivered by the Plaintiff, or any in his behalf to the Jury concerning the Matter in issue after the Jury are gone from the Bar; or if a Witness be sent for by the Jury and he repeats his Evidence again, the Verdict shall be set aside. 1 *Vent.* 125. 2 *Lev.* 240.

Statute of Jeofails helps after Verdict.

The Statute of Jeofails helps after Verdict, as it supposes the Matter left out was given in Evidence, and that the Judge directed accordingly. 1 *Mod.* 292.

In what Cases a Verdict will or will not help.

A Verdict may make an ill Plea good by Intendment, &c. but a Verdict will not help where there is no Issue: And what is good after Verdict, would
be

be ill on Demurrer; also in Criminal Cases, real Actions, or Actions *quidam*, if there be any Error in the Proceedings, they are not helped after Verdict by the Statute of Jeofails. 2 *Lill. Abr.* 664. 647. 2 *Salk.* 664. 3 *Mod.* 161.

By 7 *Will.* 3. ch. 7. in all Actions real, personal, or mixt, the Death of either Party between the Verdict and the Judgment shall not be alledged for Error, so as Judgment be entered within two Terms after.

Death of Plaintiff or Defendant between Verdict and Judgment not Error if Judgment be entered in two Terms after.

Special Verdict.

IN all Cases, and all Actions, the Jury may give a General or Special Verdict, and the Court is bound to receive it, if pertinent to the Point in Issue: And if the Jury doubt, they may refer themselves to the Court, but are not bound so to do. 3 *Salk.* 373.

Special Verdict.

When the Court directs the Jury to find a Special Verdict, one of the Council on each Side agree upon Notes for it, and draw them up and set their Hands to them; and then they are to be delivered to the Jury in convenient Time, for them to consider of before they give their Verdict: And here the Plaintiff and Defendant are to be at equal Charges in bringing in the *Possea*, enrolling the

Proceedings on Special Verdict.

T. 4 same,

same, and for Copies for the Judges; and if either Party delay to join in drawing it up, and pay his Part of the Charges, the other Party desiring it shall draw it up *ex parte*. 2 *Lill. Abr.* 645. 653.

Ibidem.

The Plaintiff and Defendant are both of them to appear in Court to hear a Special Verdict, and the Jury is to be called, and to have the Special Verdict read unto them by the second Array; and upon the reading of it, if there be any Mistake in the drawing it up, the Council on either Side may except against it; and when the Council are agreed upon the Notes of the Special Verdict, and that the same are allowed by the Court, then the Secondary demands of the Jury whether they agreed to find it so; and if they answer they do, the Verdict is found, and it is to be afterwards made up according to the Notes. 2 *Lill.* 646.

Ibidem.

When the Special Verdict is drawn up by either Party from the Notes or Dominicles the Draft or a Copy thereof is to be served upon the opposite Party; and if it be in Term, the Attorney for the Party who serves the Draft may forthwith upon Motion obtain a Rule that the Party served therewith may return the same in four Days after Service of the Rule, or in such Time as the Court shall think reasonable, or in Default thereof that the Verdict may be made

made up according to the Draft and Notes; and if the Draft be not returned in the Time given then, upon a second Motion the Court will make an absolute Rule for making up the Verdict according to the Dominicles.

If the Draft be served in the Vacation, and Delay be made in returning it, the Party who serves the Draft may the next Term upon Motion obtain the like Rules for returning the same as aforesaid. *Ibidem.*

If the Draft of the Special Verdict be drawn contrary to the Notes agreed upon, the opposite Party may make his Objections thereto, and the Judge who tried the Cause, if the Trial was by *Nisi prius*, or the Court if the Trial was at Bar, will upon Motion, rectify it. *Ibidem.*

But if a Matter of Fact be left out in the Notes or Dominicles of the Special Verdict drawn by Council, this cannot be afterwards amended. 2 *Lill*, 646. *Ibidem.*

And note. When the Special Verdict is settled and agreed upon by both Parties, and when the Record is made out, the Court will then upon Motion of Council on Behalf of either Party, Order the Cause to be set down in the Paper of Causes to be argued on some Law-Day in Term. And when the Court

Court have heard the Council on both Sides, they will give their Judgment on the Special Verdict. But note, If the Trial be by *Nisi prius*, the *Postea* is to be signed by the Judge before any Motion is made for setting down the Cause.

Ibidem.

And note, a Special Verdict tho' agreed to by Council and drawn up with their Hands to it is not a Verdict 'till allowed by the Court. 2 *Lill.* 646.

Nonfuit.

Nonfuit, what
and in what
Cases.

IF, when the Jury come to deliver in their Verdict on the Trial, the Plaintiff do not appear after being thrice called by the Cryer of the Court, he is to be nonsuited; and the Nonfuit is to be recorded by the proper Officer by the Direction of the Court at the Prayer of the Defendant's Council; for the Court will not order it to be recorded except the Council pray it.

Also, if a Man brings a personal Action and doth not prosecute it with Effect; or if the Plaintiff be not ready at the Trial when the Jury is called and sworn, the Court may call him Nonfuit: For it shall be intended he will not proceed in his Cause, tho' some time the Court have stayed a while in Expectation of his coming and making good his Action. 2 *Lill.* 231.

And

And where a Plaintiff doth not appear to hear the Verdict when he is called, and thereupon the Court directs the Nonsuit to be recorded, if afterwards he do appear before the Nonsuit is actually recorded, the Court may proceed to take the Verdict, it not being a Nonsuit 'till so recorded, and then it is made part of the Record and is in Nature of a Judgment against the Plaintiff. 2 *Lill.* 232. Ibidem.

And note, The Court calls not the Plaintiff for a Nonsuit until the Jury are about to give their Verdict, nor then either, but only for his Advantage; for the Judges of *Nisi prius* have Authority to take the Verdict without demanding the Plaintiff, and there is no Entry of his being demanded, nor is it Error if he be not. *Comb.* 331. *Trin.* 7 *Will.* 3. *B. R. Read* against *Waldron*. Ibidem.

There is also another Nonsuit of the Plaintiff by the Court, and that is either where the Proof of the Fact hath been entirely on the Part of the Defendant, and no Proof whatsoever made by the Plaintiff to clash with it: Or, where, taking the Fact as it is, uncontroverted by any Evidence, the Plaintiff is not entitled to recover, in either of these Cases, it is usual for the Court to call the Plaintiff and to nonsuit him without troubling the Jury any further. Ibidem.

Ibidem.

A Plaintiff in Ejectment not appearing at the Assizes, he was nonsuited, and this was recorded; but as there was no *Venire* or *Habeas Corpora*, the Nonsuit was discharged; because the Judge of *Nisi prius* hath not Power to nonsuit without a *Habeas Corpora* or *Distingas*. *Sed.* 164. See *Jacob's Law Dictionary*, Tit. *Nonsuit*.

Ibidem.

After a Demurrer joined, if the Court gives a Day over, the Plaintiff may be nonsuited, for the Plaintiff is then demandable; and after a Judgment *Quod Computet*, the Plaintiff may be nonsuited, because it is but an interlocutory Judgment; though after any Verdict, whereupon a final Judgment is to be given, he cannot. 1 *Inst.* 139. 2 *Lill.* 231.

Ibidem.

At common Law upon every Continuance, or Day given, the Plaintiff might have been nonsuited; so that even after a Verdict, if the Court took Time to consider of it, the Plaintiff was demandable and might be nonsuited; but this is now remedied by the Stat. 2 *Hen.* 4. ch. 7. 1 *Inst.* 139.

Ibidem.

Yet after a privy Verdict, the Plaintiff may still be Nonsuit; and so he may after a special Verdict found, and after a Demurrer, tho' the Matter was argued, if the Court give a Day over. 1 *Inst.* 153. *Dyer*, 53. *Salk.* 239.

In

In real or mixt Actions, the Nonsuit of one of the Plaintiffs or Demandants is not the Nonsuit of both; in this Case, he which makes Default shall be summoned and severed. But regularly in personal Actions, the Nonsuit of one Plaintiff is the Nonsuit of the other, unless in some particular Cases. *1 Inst.* 138, 139.

In real or mixt Actions the Nonsuit of one Plaintiff not the Nonsuit of the other, but it is in personal Actions.

Where there is but one Defendant who pleads to issue as to Part, and demurs to the other Part, the Plaintiff may be Nonsuit as to the one, and proceed for the other. *Hob.* 180.

Plea to issue as to Part, and Demur to the other Part.

The King cannot be Nonsuit, because in Judgment of Law he is always present in Court; tho' the Attorney General may enter a *Noli prosequi*; and the King's Suit may be discontinued upon the Prayer of the Party, after a Year, where it is delayed to be prosecuted. *1 Inst.* 139. *Goldsb.* 53.

King cannot be Nonsuit.

Noli prosequi.

Also notwithstanding the King cannot be Nonsuit in any Information or Action wherein he himself is the sole Plaintiff; an Informer *Qui tam*, or a Plaintiff in a popular Action may be Nonsuit, and thereby wholly determine the Suit, as well in respect to the King as himself. *Fitzherb.* 16. *1 Inst.* 139.

Plaintiff in Actions *Qui tam* and popular Actions may be Nonsuit.

By

Costs for Defendant on a Nonsuit or Verdict against Plaintiff.

By Stat. 10 *Cha.* 1. ch. 17. if any sue in any Court, any Action, Bill, Plaint, or Trespass upon 5 *Ri.* 2. ch. 7. for unlawful Entries into Lands, or for Debt, or Covenant, or upon any Contract supposed to be made between the Plaintiff and any other, or in Detinue, Accompt, or upon the Case, or upon any Statute for a personal Wrong, and the Plaintiff (after Appearance of the Defendant) be Nonsuit, or a Verdict pass against him; then the Defendant in every such Action shall have his Costs, to be taxed by the Discretion of the Judge or Judges of that Court, to be recovered as the Plaintiff might have recovered his, in Case Judgment had been given for him in any such Action.

Except Plaintiff be a Pauper.

But he that sues in *Forma Pauperis* shall not pay Costs, but shall suffer other Punishment, as the Justices or Judge of the Court shall think fit.

Or sues for the King's Use.

Nor shall any that sues for the King's Use pay any Costs to the Defendants in any Action whatsoever, upon a Nonsuit or Verdict against him.

Of the Postea and Arrest of Judgment.

UPON every Trial by *Nisi prius*, Postea what.
 in the Sittings in, or after the
 Terms, or at the Assizes, where either
 a Verdict or a Nonfuit hath been ob-
 tained, the Judge before whom the
 Cause was tried, is to indorse on the *Ni-
 si prius*, record an Abstract of the Pro-
 ceedings upon the Trial, which is to be
 returned to the Court from whence the
Nisi prius issued, and it begins thus,
*afterwards at the Day and Place, and so
 forth*, wherefore it is called the *Postea*.

And this *Postea* is usually delivered by The Proceeding
thereon.
 the Clerke of the *Nisi prius* to the Attor-
 ney for the Party for whom the Verdict
 passed, or in Case of a Nonfuit, to the
 Attorney for the Defendant.

And the *Distringas* is usually annexed Ibidem.
 to the *Postea*, altho' it is not necessary,
 for they have no Relation one to another.
2 L. P. R. 237.

And on this *Postea* a Motion is to be Ibidem.
 made by Council, without Notice for
 Judgment, and thereupon, the Court
 will grant a Rule for Judgment, unless
 Cause be shewn to the contrary within four
 Days after the Day on which the Rule is
 conceived, which Rule need not be
 served on the opposite Party, and if in
 the

the said four Days, no Cause be shewn why Judgment should not be stayed, the Court upon producing an attested Copy of the conditional Rule, and upon an Attorney's Motion thereon, will Order Judgment without further Motion.

Motion in Arrest of Judgment.

But note, a Motion may be made in Arrest of Judgment, at any Time before the last Rule is obtained, but afterwards the Party is put to his Writ of Error. And in all Cases where a Motion is made in Arrest of Judgment, due Notice thereof is to be given to the opposite Party.

16th Nov. 1670.
R U L E.

The Motion for Judgment on the Postea to be by Council.

Ordered that Motions on Postea returned upon Trials by *Nisi prius* at Affizes for Judgment to be made by Council; and that the Clerk of the Common Pleas of this Court do tax and allow Council's Fee thereon.

Postea only upon Trials by *Nisi prius*.

And note, the Postea is only upon Trials by *Nisi prius*, upon Trials at the Bar there is no Postea, for the Judgment is immediate.

If the Party may aver against the Postea.

It has been said, that a Man shall not aver against a Postea, nor shall he be received to say that the Judges gave a Judgment, and that the Clerks have entered it contrary to the Judgment. *Ow.* 49, 50. *Pasch.* 36. *Eliz. Anon. cites,* 10 *Ed.* 3. 40.

Where

Where the Judge that took the *Nisi prius* dies before the Return of the Postea certified, the Clerk of the Assize may well certify it; or the Executors of the Judge upon *Certiorari* directed to them for this *Postea*. *Jenk.* 164. *Pl.* 4. *Cites* *D.* 163.

If the Judge dies before the Return of the Postea, the Clerke of the Assize or Executors of the Judge, may certify it.

And in *Jenk.* 216. *Pl.* 59. it said that the Clerk of Assize may certify it though his Office is determined, for he was sworn to execute the said Office.

Clerke of Assize may certify it tho' his Office be determined.

If the Clerk of Assize or *Nisi prius* hath mistaken in drawing up the Postea he may amend it by his Notes before it be filed, and the Return of the Postea hath been amended by the Memory of the Judge who tried the Cause. *Cro. Car.* 338. *Sty.* 120. *Trin.* 24. *Car. Lovel* against *Knatchford*, and see 1 *Barnes's Notes of Cases*, &c. where the Return of the Postea was amended in which the Judge had mistaken the Verdict. *Williams* against *Jones* and another, *Easter*, 8 *Geo.* 2.

Mistakes in the Postea may be amended.

When a Postea has been mislaid another has been ordered to be made by the Notes in the Clerk of Assize or *Nisi prius* his Book. *per Holt Ch. J. Comb.* 285.

Where mislaid another may be made up by the Clerk of Assize's Book.

The Court upon Motion of Council, and on Cause shewn will enlarge the Time for speaking in Arrest of Judgment.

Time for moving for Arrest of Judgment enlarged.

How to enforce
the bringing in
of the *Postea*.

Judgment; but before the Motion in Arrest of Judgment is made the *Postea* must be brought in, and the Record read in Court. And if the Party in whose Custody the *Postea* is, neglects to bring it in, the other Party may give him Notice to bring in the *Postea*, in order to move in Arrest of Judgment. 12 *Mod.* 385. But in *Salk.* 78. it is said that such Notice ought not to be given but the better Way is to give a Rule upon the *Postea* for bringing it into Court, for that is Notice of itself.

Plaintiff to bring
in the *Postea*,
tho' the Verdict
be prejudicial to
him, or the
Court will en-
force it.

Altho' the Verdict given be prejudicial to the Plaintiff as he conceives, yet he ought to bring in the *Postea*, that if he will not enter the Verdict, the Defendant may, and if he or his Attorney if it be in his Hands, do not bring it in, the Court will enforce it, for it is the Record of the Court. *L. L. P. R.* 337, 338.

The Court will
compel the
Clerk of Assize
to bring in the
Postea.

There is no general Rule of Court for the Clerk of Assize or *Nisi prius* to bring in the *Postea* by a precise Time, but if it be not returned in convenient Time, the Court may be moved to have it brought in speedily. 2 *Lill. P. R.* 237.

If the Plaintiff
brings it in and
takes it out a-
gain, yet it re-
mains in the
Possession of the
Court.

Once a *Postea* is brought into Court, tho' the Plaintiff take it out again, yet it remains in the Possession of the Court, and

and the Officer of the Court may command the Plaintiff to bring it in. 12 *Mod.* 385.

And as it has been before said, due Notice is to be given of a Motion in Arrest of Judgment; and here let it be observed that Arrest of Judgment is either for Matter intrinsick, that is, such as appears by the Record itself, which will render the Judgment erroneous and reverfible, or extrinsick; that is, some foreign Matter suggested to the Court, that proves the Writ abated; for it is not enough, that it proves the Writ is only abateable. The old Course of taking Advantage in Arrest of Judgment, was thus, the Party after a general Verdict, having a Day in Court (for fo he has to Matters of Law, tho' not of Fact) did assign his Exception in Arrest of Judgment by Way of Plea, and it was called Pleading in Arrest of Judgment.

Causes of Arrest of Judgment.

The old Course of taking Advantage in Arrest of Judgment.

1 *Salk.* 78 *Pasch.* 11 *W.* 3 *B. R. anon.*

The general Causes of Arrest of Judgment are Want of Notice of Trial; where it appears that the Plaintiff hath no Cause of Action, for material Defect in Pleading, where more is given and found by the Verdict, than laid in the Declaration, but in this Case, the Plaintiff may remit the Overplus and pray Judgment for the Residue. 10 *Rep.* 115. Where it appears that the Money demanded is not yet payable; so for the

Causes of Arrest of Judgment.

uncertainty of a Verdict; where it appears the Jury gave Damages for what was done after the Action brought, &c. and note, all Matters of Fact are to be made out by proper Affidavits.

Ibidem.

Judgment upon a Demurrer and a Writ of Enquiry executed at the Return the Party may shew any Thing in Arrest of Judgment; for Judgment is not compleat until the last Judgment. *Inst. Leg.* 300.

Ibidem.

A Man may shew any Thing in Arrest of Judgment, which will make Error if the Judgment be given. *Ibidem*, 300, 301.

Ibidem.

If the *Venue* be changed after Notice of Trial, fresh Notice must be given, otherwise Judgment will be set aside. *Inst Leg.* 193.

No Motion for a new Trial after Motion in Arrest of Judgment *sed Vice Versa.*

There cannot be a Motion for a new Trial after a Motion in Arrest of Judgment, tho' there may be the latter after the former hath been made and rejected. *Salk.* 647. *Sed Quer.* if Matter had been disclosed after the Motion in Arrest of Judgment, and before Judgment was pronounced, as that the Jury had determined their Verdict by casting Lots, &c.

Death of Plaintiff after Motion in Arrest of Judgment.

If the Defendant moves in Arrest of Judgment, whereupon Judgment is stayed several Terms, and then the Plaintiff dies

dies, the Court may give Judgment *Nunc pro tunc*, as of the first Term when it was moved. 1 Sid. 462.

If after a Verdict for the Plaintiff, the Defendant by his Council moves in Arrest of Judgment, the Defendant in that Case is to be at the whole Charges for Books for the Court.

Motion by Defendant in Arrest of Judgment, he is to be at the Charges for Books for the Judges.

Judgment.

COKE in his first *Institutes*, 39. *Judgment, what.* tells us, that *Judicium* is *quasi Juris dictum*, the very Voice of Law and Right; and the antient Words of a Judgment are very significant, which are, *Consideratum est*, because that Judgment is ever given by the Court upon due Consideration, and some Judgments are Final, others Interlocutory. *Judgments are interlocutory and final.*

An interlocutory Judgment, is the Judgment that the Court gives upon due Consideration had of the Matter, that the Plaintiff ought to recover; but it being uncertain what Damages he ought to recover, therefore a final Judgment cannot be given, until the Sheriff by a Jury, on a Writ of Enquiry has ascertained the Damages; and when they are ascertained by such Jury, the Inquisition taken thereon is to be returned,

Interlocutory and final Judgment, what.

and upon such Return the Court gives final Judgment, that the Party shall recover the Damages found by the Jury, and the Costs added thereto by the proper Officer of the Court by Way of Increase; that he may suffer as little as possible in the Suit.

In what Cases.

But this interlocutory Judgment is only on *Nilil dicit*, in Actions on the Case, Trespass, or Covenant, Demurrer, &c. for in Debt it is a perfect Judgment as soon as signed, or marked by the Officer on the back of the Declaration, and there needs no Writ of Enquiry.

Ibidem.

A Judgment may be given, not only upon the Trial of the Issue, but by Default, *nilil dicit non sum Informatus*, Confession or on Demurrer.

Judgment by
Consent and the
Proceedings.

After a Declaration is filed in a Cause, the Plaintiff may, if he will, without going to Trial, or any Verdict, accept of a Judgment from the Defendant; which Judgment if the Action be in Debt, and the Defendant hath not pleaded, is to be by a Consent, in which the Defendant by his Attorney acknowledges the Debt, and consents to Judgment with Release of Errors, and Stay of Execution, until such a Day as is agreed upon between the Plaintiff and Defendant: And this Consent is by an Attorney's Motion to be made a Rule of Court, with Judgment for the Plaintiff: If it be
an

an Action on the Case, Trespass, Trover, Covenant, &c. there must be a Plea filed in which the Defendant confesses the Action, and ascertains the Damages, &c.

Ordered by the Court that from henceforth no Judgment by Confession be entered, before a Rule be given in Court, or by Consent before the Lord Chief Baron, or in his Absence before one of the Barons in his Chamber.

24th Nov. 1687.
R U L E.
Ibidem.

If the Defendant hath pleaded, then he is to file another Plea, in which, he relinquishes his former Plea, and confesses the Action; and if the Action be in Debt, he acknowledges the Debt; and if on the Case, Trespass, Trover, Covenant, &c. he confesses the Action, and ascertains the Damages, with Release of Errors and Stay of Execution as aforesaid; and on these Pleas of Confession, the Plaintiff by his Council moves for Judgment and gets Judgment absolute.

Judgment by
Plea of Con-
fession.

It is said that if a Defendant gives Judgment with Stay of Execution until a certain Day, the Plaintiff may notwithstanding such Stay of Execution, sue forth a *Capias ad Satisfaciendum*, or other Execution, to the Sheriff of the County where the Action is laid returnable before the Day, as a Foundation for a *Testatum* Execution against the Defendant; *Sed quær.* But no *Capias ad Satisfaciendum*, shall in such Case be sued

Judgment with
Stay of Execu-
tion. Plaintiff
may before the
Day sue forth a
Capias Satisfaci-
endum, to ground
a *Testatum* on, a-
gainst the De-
fendant, but not
to warrant a *Sci-*
re facias against
the Bail.

forth to warrant a *Scire facias* against the Bail, because it is to the Prejudice of a third Person.

A Plaintiff may be obliged to enter his Judgment.

If a Verdict pass for the Plaintiff, and he will not enter his Judgment, the Defendant by Motion of Court may oblige him to it, to the End he may plead it to another Action. 2 *Lill*, 97. 1 *Danv.* 722.

Judgments.

Judgments are not only to be signed by the Judge, but entered of Record, before which they are not Judgments, and in a Judgment given to recover a Sum of Money, the Sum must be entered in Words at Length, and not in Figures, which may be easily altered. 2 *Lill*, 103. 3 *Lev.* 430.

Judgment in Debt on Specialty.

In Debt on Specialty, the whole and exact Sum must be demanded, or the Judgment upon it will not be good. 3 *Mod.* 41.

Judgment by Default if to be impeached or set aside.

A Judgment by Default, is not to be impeached where the Party makes Defence upon the Writ of Enquiry. *Mod. Caf.* 289.

Ibidem.

Upon Payment of Costs, the Court will set aside a Judgment by Default, tho' it be regularly signed, if the Plaintiff has not lost a Trial. 1 *Salk.* 402.

By

By 7 *Will.* 3. ch. 7. in all Actions, Real, Personal, or Mixt, the Death of either Party between the Verdict, and the Judgment shall not be alleged for Error, so as Judgment be entered within two Terms after such Verdict.

Death not to be alleged for Error.

By 7 *Will.* 3. ch. 6. where any Executors or Administrators to any Person deceased, shall obtain any Judgment in Law, in any of the King's Courts of Record within this Kingdom, in their own Names for any Debt due to the Testator or Intestate, and shall happen to die before any Execution sued forth, in such Case, any Administrator or Administrators of the Goods unadministred, of the first Testator or Intestate, may sue forth a *Scire facias* upon the same, and have the Benefit thereof as fully, as such Executor or Administrator might have had if Living. But this was otherwise at the common Law before this Statute, as the Administrator of the Goods unadministred, was accounted no Way Party or Privy to the Judgment, but a mere Stranger to it. *Inst. Leg.* 88. 2 *Lill.* 505.

Administrators *de bonis non* may sue a *Scire facias*.

Scire facias.

By 9 *Will.* 3. ch. 35. the Death of the Plaintiff (after interlocutory and before final Judgment) shall not abate the Action in any Court of Record; but his Executors or Administrators may proceed to final Judgment against the Defendant, as he might if alive (if the Action might be

Death of Plaintiff or Defendant after interlocutory and before final Judgment, shall not abate the Action, but the Executor may by *Scire facias* have Judgment, &c.

be maintained originally by an Executor, &c.) and so if the Defendant shall die, yet the Plaintiff or his Executors or Administrators, may proceed against the Executors or Administrators of such Defendant to a final Judgment, as if the Defendant had been living, if the Action might be originally brought against the Executor, &c. And in such Case, of the Death of such Plaintiff as aforesaid, his Executors, &c. may sue out a *Scire facias* against the Defendant if then living, or if dead, against his Executors, &c. for reviving and continuing such Suit, and for them to shew Cause, why the Plaintiff his Executors, &c. should not proceed to Judgment final; and if at the Return thereof they appear, but shew no sufficient Cause, or (in Default of Appearance) it be returned that they were duly warned, or after two Writs of *Scire facias*, it be returned they could not be found, or had nothing by which they could be summoned, a Writ of Enquiry of Damages shall be awarded for the Plaintiff, on the Return whereof duly executed, Judgment final shall be given for him against such Defendant.

Scire facias.

Judgment to be
against the Ad-
ministrator.

But Care must be taken how you enter that Judgment; for in *Salk.* 42. in the Case of *Weston* and *James*, the Court were inclined to be of Opinion, that the Judgment should not be, that the Plaintiff should

should recover against the Intestate, but against the Administrator.

And note, whether the Plaintiff as Executor, or Administrator sues out such *Scire facias*, the Defendant cannot plead to the *Scire facias*, Matter to avoid the Action, but only in Arrest of the Judgment; because the Executor or Administrator shall do no more to the *Scire facias*, than the Testator or Intestate could have done to the Judgment before. *Smith* against *Hernon*, 1 *Salk.* 315.

The Plea to such *Scire facias*.

And by said last mentioned Statute, where two or more are Plaintiffs in any Action, against two or more Defendants, the Death of one or more of such Plaintiffs or Defendants, shall not abate the Writ in such Action, but that the same being suggested upon the Roll or Record of such Action, the surviving Plaintiff or Plaintiffs may proceed to Judgment, against such surviving Defendant or Defendants, as if such Death had not been. See *Amendment* and *Jeofail*, *Error*, *Scire facias*.

Where two or more are Plaintiffs or Defendants, Death of one of them shall not abate the Writ.

Suggestion.

Judgments acknowledged for Debts.

The Course of
acknowledging
Judgments for
Debts.

THE Course for one to acknowledge a *Judgment for Debt*, is for him that doth acknowledge it to give a general Warrant of Attorney to any Attorney, or some particular Attorney of a Court, or to any Attorney of any of his Majesty's Courts of Record, to appear for him at the Suit of the Party, unto whom the Judgment is to be acknowledged, upon a Declaration to be filed in any of the said Courts against him, and then to plead *Non sum Informatus, Cognovit Actionem*, &c. or to let it pass by *nihil dicit*; whereupon Judgment is entered for want of a Plea. 2 *Lill.* 105.

Death of the
Party counter-
mand of the
Warrant.

If one gives a Warrant of Attorney to confess Judgment, and dies before it is confessed, this is a countermand of the Warrant. 1 *Vent.* 310. However where the Person dies in Term Time, it is generally practiced to enter the Judgment after his Death, by making the Appearance the first Day of Term. See Page 302.

Warrant of At-
torney from a
Feme Sole who
afterwards mar-
ries.

If a Feme Sole gives Warrant of Attorney to confess Judgment, and marries before it is entered, the Warrant is countermanded, and shall not be entered against

Judgments acknowledged for Debts.

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against Husband and Wife. 1 Salk.
339.

These Judgments are usually entered against Persons intitled to Privilege of Parliament, not only in Time of Privilege, but during the Sitting of Parliament, they being the common Securities of the Kingdom.

These Judgments may be entered in Time of Privilege.

If a Peer of the Realm and a common Person be jointly and severally bound in a Bond, let separate Judgments be entered against them; otherwise, you cannot have Execution against the Person of the Party that is joined with the Peer.

Separate Judgments to be entered against a Peer and common Person.

A Man may at one and the same Time have an Execution, against the Lands or Goods, and a Mark'd Writ against the Body of the Defendant upon the same Judgment; and if the Plaintiff proceeds upon the Writ, he must declare upon the Judgment, and an attested Copy of the Judgment proved upon the Trial, shall be sufficient Evidence for the Jury to find a Verdict for the Plaintiff. But note, when Judgment is entered on a Bond, the Action must be brought upon the Judgment, it cannot be upon the Bond; the Security is changed.

Mark'd Writ and Execution on the same Judgments.

It is dangerous to take a Judgment acknowledged in the Vacation, as of the Term

Judgment entered in Vacation.

Judgments acknowledged for Debts.

Term Precedent, and if any such Judgment be taken, the Warrant of Attorney to confess the same must bear Date before, or in the Term whereof it is confessed; but the safest Way is to make it a Judgment of the subsequent Term, tho' common Practice is otherwise. 2 *Lill*, 103.

The Method of entering Judgments after the Death of the Obligor or Obligee.

Where the Person who gives a Warrant of Attorney to confess Judgment, dies before Judgment is entered; if he dies in the Vacation Time, and the Warrant of Attorney was executed before the Vacation, Judgment may be entered any Time before the Effoien Day of the ensuing Term as of the preceding Term, by making the Day of Appearance, on any Day, in the preceding Term, subsequent to the Day, on which the Warrant was executed. If he dies in Term Time, then the Judgment may be entered at any Time in the same Term, but the Day of Appearance must be before his Death, and in the same Term.

Ibidem.

The Practice is the same, when the Obligee dies before Judgment entered.

Ibidem.

But Judgment is never entered after the last Day of the Vacation, if the Death happens in the Vacation; or after the last Day of the Term, if the Death happens in Term; either in

Cale

Judgments acknowledged for Debts.

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Case of the Death of the Obligor or Obligee.

Where a Bond is given dated in Vacation Time with a Warrant of Attorney in the usual Manner, to enter Judgment as of any Term or Time whatsoever; it is generally received, that Judgment cannot be entered as of the Term before, as it would appear upon the Face of the Record, that the Judgment was of a Term before the Debt commenced. So that by this Rule, if in this Case, either the Obligor or Obligee should happen to die, no Judgment can ever be entered on that Warrant, for that it cannot be entered as of any Term, after the Death of either the Obligor or Obligee, there is no Doubt. *Sed quær.* if Judgment should be entered, on such a Bond and Warrant as of the preceding Term, and before the *Essoi'en Day* of the succeeding Term, if it would not be good by Relation? for the Day of signing is material only with Respect of charging Lands; and if the whole Term and the Vacation after it, be not considered as but one Day in the Law?

Bond and Warrant dated in Vacation, how Judgment is to be entered.

Now in order to obviate these Difficulties, where Bonds and Warrants are thus executed in Vacation Time, or in order to give Precedence, or to give Notice to Purchasers, it is practiced by some Attornies to enter Judgment as of the preceding Term, with a Blank for the

Date

Ibidem.

Judgments acknowledged for Debts.

Date of the Bond; and sometimes Bonds and Warrants executed in Vacation Time, are antedated; that is, they are made to bear Date the last Day, or some Day preceding the last Day of the foregoing Term; but how far a Judgment in either of these Cases, if it should be called in Question, though it may be good against the Conuzor and his Heirs, would avail with respect to Purchasers or other Creditors, is well worth considering.

Ibidem.

There is another Method sometimes practiced, and which seems to be by far the best, and that is, to draw the Warrant of Attorney in such a Manner, as to impower to enter Judgment as of the precedent Term, or as of any subsequent Term, and then there need not be any Blank left for the Date of the Bond, for the Warrant of Attorney and the Release of Errors in it, will support the Judgment. *

Judgment with Stay of Execution, or for Indemnity or Performance of Covenants.

Where a Warrant of Attorney to enter Judgment, is executed with Stay of Execution, and that Judgment is entered before the Day of Payment; you enter on the Margin thus, *with Stay of Execution until*, &c. and if it is a Judgment for

* It is to be wished (if it could properly be done,) that some Rule was made to settle this Difficulty, as to entering Judgments in Vacation Time, upon Warrants then executed.

Judgments acknowledged for Debts.

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for Indemnity, you enter in the Margin, *Indemnity*; The Rule is the same where it is for Performance of Covenants.

If a Warrant of Attorney be given to two Persons, and one dies before Judgment is entered, the Judgment may be in the Name of the Survivor, with a Suggestion of the Death of the Party.

A Warrant of Attorney to two, and one dies, Judgment in the Name of the Survivor.

A Man gave a Bond and Judgment defeasanced upon Payment of Money on such a Day, and it was agreed that Execution should not be sued out before; but a *Fieri facias*, was sued out a Month before, and executed upon Demand and Nonpayment of the Money: And tho' this was a Breach of Agreement, since it was for a just Debt, the Court would not undo any Thing, for fear it would frustrate the Judgment. *Mod. Caf. 49.*

Execution issued notwithstanding a *Cessat Executio*.

On these Judgments a Release of Errors is usually entered into, at the Time of the Warrant of Attorney given, or Judgment had. And when a Judgment is satisfied, it is to be acknowledged on Record by Attorney.

Release of Errors to be in every Warrant of Attorney.

Ordered upon Motion of Sir *John Temple*, Knight, his Majesty's Solicitor General of Council, with *Thomas Scudmore*, Esq; that for the future, in the Absence of all the Barons of this Court, being all out of Town, that Judgment may

10th Feb. 1686.
R U L E.
Judgment may be entered in Vacation in the Absence of the Barons.

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X

be

Judgments acknowledged for Debts.

be entered by *Cognovit Actionem* of Course, by the Officer of the Pleas Office of this Court, by Consent of two Attornies for the Plaintiff and Defendant, as hath been heretofore accustomed and used.

27th Jan. 1700.
R U L E.
The Costs to be
taxed on Judg-
ments by *Cogno-
vit*.

Ordered that the Clerk of the Pleas Office of this Court, do for the future, upon all Judgments entered by *Cognovit Actionem*, tax and allow the Plaintiff in such Judgment, the Costs of entering the Appearance for the Defendant, and the Attorney's Fee for the acknowledging the Action thereupon. And it is further ordered, that if at any Time for the future, it shall happen, none of the Judges of this Court to be in Town, that then the Officer may issue Executions upon such Judgments, by *Cognovit Actionem* or otherwise, of Course, notwithstanding the Absence of the said Judges at the Time of the issuing of such Execution.

Caution to At-
torney against
acting under
Warrants of At-
torney attested
by themselves.

And note, it is frequently practised by Attornies, to sign Judgments, and also Satisfactions on Record by Virtue of Warrants of Attorney for that Purpose attested by themselves; but they should consider what the Consequences might be, if the Execution of one of these Warrants should ever happen to be called in Question, and that the Proof of it depended only on the single Evidence of the Person who had acted under it.

The

The several Statutes relating to Judgments, and the assigning thereof.

BY Stat. 7 Will. 3. ch. 12. any Judge or Officer, of the King's Courts at *Dublin*, that shall sign any Judgment, shall at the signing of the same, (without Fee) set down the Day of the Month, and Year, of his so doing, upon the Paper, Book, Docket, or Record, which he shall sign; which shall also be entered upon the Margin of the Roll of the Record, where the said Judgment shall be entered.

Judges and Officers signing Judgments to set down the Day and the Year on the Paper, Book, Docket or Record.

And such Judgments as against Purchasers *bona fide* for valuable Consideration, of Lands, &c. to be charged thereby, shall be Judgments only from such Time, as they shall be so signed; and shall not relate to the first Day of the Term whereof they are entered, or the Day of Return, or filing the Bail.

To bind Purchasers from that Time only.

The above Act, was enacted, to remedy the Grievances that Purchasers often suffered, by Judgments many Times relating to the first Day of the Term whereof they were entered, or the Day of the Return of the Original, or filing the Bail, and binding the Defendant's Lands from that Time, altho' in Truth they were

The Intent of the Act.

acknowledged, or suffered, or signed in the Vacation Time after the said Term.

Incumbrances charging the Estates of Papists how and where to be enrolled.

By 2 *Ann.* ch. 6. *pars.* all Debts and other real Incumbrances that do, may or shall before the first of *February*, 1703, charge any Estate of any Papist; shall on or before the first of *June*, 1704, be enrolled in the Court of *Exchequer*, in Rolls to be appointed by the Court, which shall be kept in some publick Place belonging to the said Court, to be appointed by the Court, where all Persons may have the Perusal of them; and in Default of such Enrollment, such Debts, &c. shall not charge any Lands of such Papist, during such Time as the same shall belong to a Protestant; and all Debts and Incumbrances to be contracted, and made after the first of *February*, 1703, that shall charge the real Estate of such Papist, shall, within six Months next after the making thereof, be enrolled in the Court of *Exchequer* as aforesaid; and in Default thereof, the same shall not charge such Lands during such Time as they shall belong to a Protestant.

8th *May*, 1704.
R U L E.
All Debts, &c.
affecting the Estates of Papists,
to enrolled in the
Auditor General's Office.

It is ordered by the Court, That all Debts and other real Incumbrances upon the real Estates of Papists within this Kingdom of *Ireland*, be entered and enrolled in his Majesty's Auditor General's Office, pursuant to a late Act of Parliament made in this Kingdom, recited
an

an Act to prevent the further growth of Popery.

After the making of this Statute and Rule, it was practiced to enter Judgments in some one of the Offices, either of the *King's-Bench*, *Common-Pleas*, or of this Court, and afterwards to enroll them in the Auditor General's Office; but it should seem by this Act that if Judgments against Papists, are entered in this Court within the fix Months, that there is no Occasion for enrolling them in the Auditor General's Office; and it was so determined in the Case of *Betagh* against *Hamlin*, 20th November, 1747. But note, it was not known, at the Time of this Determination, that the above Rule was in being.

By Stat. 6 *Geo.* 1. ch. 6. S. 19. no Satisfaction shall be entered on the Record of any Judgment, upon the Motion of any Attorney, except the said Attorney shall prove his Warrant for acknowledging such Satisfaction, by Affidavit of one credible Witness in Writing, to be filed in the Office where such Judgment is acknowledged.

Ibidem.
No Satisfaction of any Judgment shall be entered of Record by Attorney, except he prove his Warrant by Affidavit of one Witness.

Notwithstanding the aforefaid Act, 7 *Will.* 3. great Damage and Inconvenience, happened not only to Purchasers and Mortgagees, but also to the Heirs, Executors, or Administrators of Persons deceased, by Judgments entered upon

Statutes relating to Judgments, &c.

Record in his Majesty's Courts at *Dublin*, notwithstanding the said Law, by Reason of the Difficulty there was in finding out such Judgments; in regard that after the signing of such Docket or Record by any of the Judges or Barons, the Plaintiff or his Attorney, did sometimes keep the Docket or Record so signed, for a considerable Time in his Custody, before the same was brought to the proper Court to be entered on Record. Therefore for Remedy thereof,

The Day of the Month and Year that Judgments are brought in, to be entered on the Record, and also on the Margin of the Roll.

It was enacted by 3 *Geo.* 2. ch. 7. That upon the Docket or Record of every Judgment acknowledged before, or signed by any Judge or Baron according to 7 *Will.* 3. ch. 12. by which the Day of the Month and Year of the Judge or Officer's signing the same, was to be set down upon the Paper, Book, Docket, or Record, which he should sign, and which was to be entered on the Margin of the Roll of such Record, &c. as soon as the same is brought into the proper Office, to be entered of Record; the Officer who is to enter it, shall upon such Docket or Record, mark the Day of the Month and Year that it is brought in; which Day of the Month and Year, shall be also entered on the Margin of the Roll of the Record, when the said Judgment shall be entered, as well as the Day when it was acknowledged and signed as aforesaid.

Such

Such Judgments as against Purchasers, or Mortgagees *Bona fide* for valuable Consideration of Lands. &c. to be charged thereby, shall in Consideration of Law, be Judgments only from such Time as they shall be brought into the proper Office, to be entered of Record, and signed by the proper Officer on such Docket as aforesaid; and shall not have any Preference against Heirs, Executors, or Administrators in their Administration, to their Ancestors, Testators, or Intestates Estates, but from the Time aforesaid.

How Purchasers or Mortgagees are to be charged thereby.

By the 15 *Geo. 2. ch. 6.* the above Statute is continued for eleven Years from the 25th *March, 1742*, and from thence to the End of the then next Session of Parliament. *

* *Quar.* is not this Stat. now expired.

By the 8 *Geo. 1. ch. 6. pars.* it is enacted, that the Prothonotaries of the chief Place and *Common-Pleas*, the Clerk of the Pleas of the *Exchequer*, and the Clerk of the Recognizance and Statute Staple of the *Chancery*, and their Deputies, when any Search is required to be made by any of them, concerning any Judgments, Statutes Staple, Merchant, or Recognizance entered since the 29th Day of *May, 1660*, or which hereafter shall be entered in any of the Courts aforesaid, when no Judgment, Statute, or Recognizance, can be found entered in any of the said Courts, against the Per-

Negative Certificate.

son concerning whom such Search is required to be made ; in such Case, such Prothonotary, &c. shall give a Certificate under his Hand, that having made diligent Search in his Office, he does not find any Judgment, Statute, or Recognizance; entered against the Person concerning whom such Search is made ; or if any Judgment, Statute, or Recognizance, be entered against the Person concerning whom such Search is made, then they shall respectively certify they only find such Judgment, Statute, and Recognizance entered against the Person mentioned in such Certificate, and no other ; which Certificates the said Prothonotaries, &c. shall sign, and give under their Hand ; and if any of the Officers aforesaid, or Deputies, shall be guilty of any Fraud, or Neglect, in making any such Certificate, whereby any Person shall be aggrieved or damnified, such Person his Heirs, Executors, or Administrators, shall recover his Damages against such Officer or Deputy with full Costs.

Assignment of Judgments.

All the aforesaid Judgments may by the Conusees thereof or the Persons who obtain the same, at any Time after the said Judgments are so acknowledged, or obtained, be assigned over and transferred to others for Considerations given, or to protect the Purchase of Estates ; but before the Statute of 9 Geo. 2. ch. 5. as the Law then stood, such Assignments were no more than equitable Securities

in the Hands of the Assignees ; and the Assignees of such Judgments, could not revive or discharge the same in their own Names, but in the Names of the Conusees, or Persons who obtained such Judgments, or their Representatives ; which was often attended with great Inconveniences, as the Conusees after such Assignment, might have entered Satisfaction on the Record of such Judgment, without the Knowledge or Consent of the Assignee. For Remedy whereof,

By the said Statute 9 *Geo. 2. ch. 5.* it is enacted, That where any Conusee of a Judgment, Statute, Staple, or Merchant, his Executors or Administrators, shall assign the same, such Conusee his Executors or Administrators shall also perfect a Memorial of such Assignment, under Hand and Seal, upon Parchment or Vellum, attested by two or more credible Witnesses, containing the Name or Names, and Addition of the Person or Persons assigning, the Name or Names of the Person or Persons to whom assigned, and the Sum or Sums in such Assignment remaining due or unsatisfied upon such Judgment or Statute, with the Day and Year whereon such Assignment was perfected ; and one of the Witnesses to such Memorial, who shall be a Witness to such Assignment, shall make an Affidavit at the Foot of such Memorial, of the true Perfection of such Assignment and Memorial, before the Officer or Officers where such Judgment or Statute shall

The Memorial
of Assignment of
Judgments.

shall be entered, or his or their legal Deputies, or before any one of the Judges of the four Courts, or before any one of the Judges of his Majesty's Courts at *Westminster*, who are impowered to take such Affidavit; which Memorial and Affidavit shall be lodged in the proper Offices, where such Judgment or Statute is entered; and the several Officers of the said Courts shall enter such Memorial of such Assignment, Statute, Staple, or Merchant, in a Roll of Parchment or Vellum, to be kept for that Purpose, in the Office where such Judgment, or Statute, shall be entered, and the Officer is to indorse on such Assignment, the Day of the Month, and Year, and Hour of the Day whereon such Memorial was lodged and proved; and for the more easy finding such Assignment, the Officer shall enter the Number and Roll where such Assignment is registered, at the Foot of each Judgment or Statute assigned; for which Indorsements, Entries, and Affidavits upon each Memorial, six Shillings and eight Pence shall be paid.

The Advantages
the Assignee hath
by the Assign-
ment.

After such Memorial of such Assignment, shall be entered on such Roll as aforesaid, the Assignee of such Judgment or Statute, his Executors, Administrators, or Assigns (and no other) may revive such Judgment or Statute from Time to Time, in his or their own Name, and take out one or more Executions on the
same

same in the Name of such Assignee, his Executors, or Administrators, and sue forth Execution thereon, reciting the special Matter; and also discharge or release the same; and also in his or their own Names, enter Satisfaction on the Record of such Judgment or Statute, in as ample Manner as the Conusee, his Executors, or Administrators might do; and the Conusor of such Judgment or Statute, his Executors, Administrators, or Assigns, may, upon Payment to such Assignee, plead Payment specially to such Assignee; and such Assignee, his Executors or Administrators may from Time to Time, assign the same over in Manner aforesaid, and such Assignment shall be proved and registered in the proper Office as aforesaid; and such Assignee may revive, and sue out Execution in his own Name, and discharge and acknowledge Satisfaction on such Judgment or Statute as aforesaid.

Provided the Conusor of such Judgment or Statute, his Heirs, Executors, or Administrators, shall have the same Remedy and Defence in Law and Equity against the Assignee, or his Representatives, which he might have had against the Conusee or his Representatives, in Case no such Assignment had been made.

The Conusor to have the same Defence against the Assignee as against the Conusee.

The

The Assignee
may assign.

The Assignee of any Judgment, or Statute already assigned, his Executors, or Administrators, may perfect such Memorial as aforesaid, and have the same entered, and revive and sue out Execution, and acknowledge Satisfaction in his or their own Names, and assign such Judgment or Statute in Manner aforesaid.

The Act for
assigning Judgments
continued.

This Act by the 17 *Geo.* 2. ch. 8. is continued in full Force till the Year 1755, and from thence to the End of the then next Session of Parliament.

Assignees of
Judgments to
be considered in
Law and Equity
in the Place of
the Assignors,
and may do every
Thing they
might have done.

By Stat. 25 *Geo.* 2. ch. 14. every Assignee of Judgments, Statutes Staple, or Merchant, by Virtue of the aforesaid Act, 9 *Geo.* 2. for the more effectual Assignment of Judgments, their Executors, Administrators, or Assigns, may not only revive such Judgments or Statutes in their own Names, and take out Executions thereon, but may also bring an Action of Debt, or proceed thereon in their own Names, and be considered in the Place and Condition, either in Law or Equity of the Assignors.

Scire facias.

THE *Scire facias* is a Writ Judicial, *Scire facias* what and when given. and is usually to warn a Man to come and shew Cause to the Court, why Execution of a Judgment that is passed should not be done, and this Writ lay not at the Common Law, but was given by the Statute of *Westminst.* 2. ch. 45.

And by the said Statute it is enacted, That for all Things recorded before the King's Justices and contained in Fines, (whether Contracts, Covenants, Obligations, Services for Customs acknowledged, or any other Things enrolled) a Writ of Execution shall be within the Year ; but after the Year a *Scire facias* whereupon if Satisfaction be not made, or good Cause shewn, the Sheriff shall be commanded to do Execution.

It issues out of the Record, and lyes In what Cases. where Debt and Damages are recovered, and no Execution is sued out within the Year and Day ; then, after the Year and the Day the Plaintiff shall have this Writ to summon the Defendant to shew Cause, why there should not be Execution sued out upon the Judgment against him ; and if he can shew no Cause, then there is Judgment, *Quod Habeat Executionem.* 2 *Lill. Reg.* 314.

And

In case of Death
no Execution on
the Judgment till
Scire facias.

And where either Plaintiff or Defendant after final Judgment dies, Execution cannot be sued out on the Judgment until a *Scire facias* issues, and Judgment is obtained thereupon; for in these Cases, there is to be a new Judgment to warrant Execution. 2 *Lill.* 500. See the Statute 9 *Will.* 3. ch. 35. See also Title abatement.

How to be prosecuted.

Quer.

This Writ is thus to be Prosecuted; first go to the Office where Judgment is entered and (unless it be against the Heir and Ter-tenants) you are to get two *Scire facias*'s drawn, commonly called a first and an *alias Scire facias*, the one bearing Date or Test of a Term past, and the other in the Term in which you issue them; and there must be fifteen Days between the Test and Return of each of them: Then give them to the Sheriff of the County to which they are directed, who must either return thereon a *Scire feci*, or two *Nibils* which is as good; for two *Nibils* amount to a *Scire feci*.

Judgment on
two *Nibils*.

And if the Sheriff returns two *Nibils*, the Court upon Motion of the Plaintiff's Attorney will grant the Plaintiff present Judgment, and he may immediately enter the same on the back of the *Scire facias* and take out Execution at his Election: But when the Plaintiff moves for Judgment on the two *Nibils* (if the Defendant desires it) the Court will grant him four Days to plead, and shew Cause why the Plaintiff

Plaintiff should not have Execution against him for the Debt and Costs formerly recovered : And if the Defendant can shew any good Cause, as a Release, Satisfaction, or any other just Cause, or sufficient Discharge, then he may appear and plead his Discharge in Bar.

Although the Defendant should neglect to move for Time to plead, when the Plaintiff moves for Judgment on the *Nibils*, yet upon Motion of the Defendant's Attorney, any time before Judgment is entered in the Office, the Court will give the Defendant Time to plead, pleading an issuable Plea, so that the Plaintiff be not thereby hindered of a Trial : But if the Motion for Judgment on the *Scire facias* should be made on the last Day of the Term (which is generally the Case when the Execution is to issue to the same County where the *Venue* is in the Judgment) the Defendant, unless he move by his Attorney *Instante* for Time to plead, is for ever precluded.

Time to plead in what Cases granted.

And note, where an Execution is to issue to a different County, from that where the *Venue* is laid in the original Declaration ; in such Case, be it by *Capias ad Satisfaciendum* or *Fieri facias* (for an *Elegit* may issue to any County) the Plaintiff must move for Judgment on the *Scire facias* and two *Nibils* before the last Return of the Term, in order to obtain a *Tessatum* Execution, otherwise he cannot

Where a *Tessatum* Execution is to issue the motion for Judgment on the *Scire facias* and two *Nibils* to be before the last Return of Term.

not issue the *Testatum* that Term; and when this Return is out, the Clerk of the Pleas will grant you an Execution and *Testatum* at one and the same Time, and even before the Sheriff has returned the Execution; however, the Plaintiff's Attorney regularly should get the Execution returned, before he executes the *Testatum*.

1st. Feb. 1676.

R U L E.

On a *Scire feci* returned, Rules to plead to be entered as on a Declaration.

If on the *Scire facias* the Sheriff returns a *Scire feci* the Officer is to enter Rules to plead thereon, in the same manner as on a Declaration.

If the Sheriff will return a *Scire feci*, there need issue but one *Scire facias*.

If you can depend upon the Sheriff's returning a *Scire feci*, you need not be at the Expence of an *alias Scire facias*. But if two *Scire facias*'s do issue, and the Sheriff will return a *Scire feci*, he must return a *Nihil* upon the first *Scire facias* and the *Scire feci* upon the *alias Scire facias*; because it appears by the *alias*, that a former *Scire facias* has issued, and been delivered to him, which former one must be enrolled upon the Record as well as the *alias Scire facias*.

And but one *Scire facias* Heir and Ter-tenants.

Where a Judgment is to be revived against the Heir and Ter-tenants, an *alias Scire facias* is never issued; for the Heir and Ter-tenants must be summoned, and a *Scire feci* returned before the Plaintiff can proceed to Judgment.

If

If on such *Scire facias* against the Heir and Ter-tenants, the Heir shall only plead, or if some, or one of the Ter-tenants shall appear and plead, and the Heir and other Ter-tenants shall not; in either Case, the Plaintiff may proceed to Trial against such as shall appear and plead; but he must be careful to enter Judgment by Default against such as have not pleaded; and this Judgment is inserted in the Issue of *Nisi prius*, with Stay of Execution until the Plea pleaded is determined.

How to proceed in Case the Heir only or one of the Ter-tenants shall plead.

A *Scire facias* to revive a Judgment ought not to be granted until the Record of the Judgment be in the Court, where the *Scire facias* is moved for; for the Record is the Warrant for the *Scire facias*, and if there is no Judgment, there is no Ground to move for it. 2 Lill. 498. Styles Reg. 575.

No *Scire facias* till the Record is in Court.

A Writ of Error is a Continuance of the Cause, so no *Scire facias* is required, though it depend some Years; because, pending the Writ of Error, the Plaintiff cannot sue out Execution of the Judgment, but he may, after the Affirmation of it, &c. 2 Lill. 500. 504.

There need no *Scire facias* pending a Writ of Error.

Where Judgment is had against a Testator, there must be a *Scire facias* against the Executor (although within the Year) to shew Cause why Execution should not be had; the like against an Administrator of an Intestate, and so on the Plaintiff's

Plaintiff or Defendant dying, or a Feme sole Marrying, *Scire facias* to issue altho' it happen within the Year.

part, if Heir, Executor, or Administrator, the Person being altered. And if one recovers against a *Feme Sole*, and she is married within the Year and Day, a *Scire facias* is to go against the Husband.

Scire facias to be brought in the same County with the original Action.

A *Scire facias* is in the nature of an Action, as the Defendant may plead to it: And it ought to be brought in the same County where the original Action was laid, for it must always pursue the the first Action. *Finch*, 477. *Cro. Jac.* 231.

In what Case discontinued.

And if one doth not proceed upon a Writ of *Scire facias* within a Year and a Day after it was taken out, he cannot afterwards proceed upon that Writ which is discontinued, but is to sue out a new *Scire facias*. 2 *Lill.* 504.

To be pleaded to before Judgment, but a Writ of Error lies after Judgment.

A *Scire facias* may be pleaded to, before Judgment given upon it, afterwards it is too late; though a Writ of Error may be brought to reverse the Judgment on the *Scire facias*, if the first Judgment be not good. 2 *Lill.* 503.

Payment a good Plea.

Payment was no Plea at Common Law to a *Scire facias* upon a Judgment, because it is a Debt upon Record; but this is altered by 6 *Ann.* ch. 10. *pars.* See Page 131.

Judgment against two and one dies,

Where a Judgment is had against two, and one dies before Execution, the *Scire facias*

facias ought to be brought, as well against the Survivor, as against the Heir and Ter-tenants of the deceased : And Lord Chief Justice *Holt*, (as it is reported) said as this was a judicial Writ, it might be framed upon the subject Matter, and proposed the Form to be thus.

how the *Scire facias* is to be brought.

That the Writ should be against the Survivor, to shew Cause why the Plaintiff should not have Execution against him *de bonis et catallis*, and of the Moiety of his Lands ; and against the Heir and Ter-tenants of the deceased, to shew Cause why the Plaintiff should not have Execution of the Moiety of the Lands of the deceased, without mentioning the Goods. *Caribew*, 107. *Pantān* and the Ter-tenants of the *Hall*.

Ibidem.

In like Case, a *Scire facias* may issue against the Survivor, and also against the Executor or Administrator of the deceased, to shew Cause why the Plaintiff should not have Execution of the Goods and Chattels of the Testator or Intestate.

Ibidem.

In case of the Death of a Defendant in a Judgment, the Plaintiff cannot have a *Scire facias* against the Heir and Ter-tenants, and another against the Executor or Administrator of the deceased ; but he may make his Election which he will have, and only one he can have, and even on a Judgment against two Persons, if both are dead, the Plaintiff cannot have

On the death of the Defendant, a *Scire facias* cannot issue against an Executor or Administrator, and another against the Heir and Ter-tenants.

separate *Scire facias*, because the Judgment is joint and so must the Execution be.

Scire facias against the Heir and Ter-tenants to several Counties.

Where a Judgment is had against a Person, and he dies, and at the Time of his death he had several Estates in different Counties, a *Scire facias* must issue to every County in which the Conusor in the Judgment had an Estate, and the Heir and every Tenant of every Estate must be summoned; for if there should be any Tenant not summoned, it may be pleaded in abatement by any of the Tenants who are summoned, and the Plea will be good; but these several *Scire facias*'s cannot issue upon the same Judgment, at the first Instance; for, but one can issue, which is to be directed to the County in the Judgment, and if the Sheriff returns that there are no Heirs, &c. or a *Scire fecit*, then the Officer may issue other *Scire facias*'s, to every County in which the Defendant had an Estate at the Time of his Death, and they are to be *Testatums*; but in this Case a suggestion of the Matter must be first entered on the Record of the Judgment, before the *Testatum Scire facias* issues.

And note the Plaintiff in the *Scire facias* is allowed two Shillings for summoning the Heir, and one Shilling for every Tenant that is summoned.

At the Common Law if any Administrator obtained a Judgment for a Debt due to the Intestate, and then he died also intestate, and Letters of Administration *de bonis non* were granted; this last Administrator could not have a *Scire facias* to revive the Judgment, but was obliged to bring a new Action to Recover the Debt; for he was accounted no way a Party or privy to the Judgment, but a mere Stranger to it; but this was altered by *Stat. 7 Will. 3. ch. 6.* See 297.

Administrators
de bonis non may
sue a *Scire facias*.

When a Judgment is to be revived against, or at the Suit of a Person, who at the Time is Sheriff of the County where the *Venue* lies, the *Scire facias* is to be directed to the Coroners; but first there must be a suggestion drawn of this Matter, and thereupon the Party who revives the Judgment is to move that the same be received, and entered of Record, and that a *Scire facias* may issue to the Coroners.

Scire facias to the
Coroners where
the Judgment is
against the Sher-
riff.

Suggestion.

An Execution issued and sealed, within the Year in which the Judgment is entered, keeps the Judgment on foot, and there needeth not a *Scire facias* to revive it; and the Plaintiff may renew the Execution at any Time within a Year from the Return thereof.

Judgment kept
on foot by issuing
Execution with-
in the Year.

If a Judgment be entered (for instance) in *Hillary Term* 1742, the Plaintiff may issue Execution in *Hillary Vacation*

tion 1743, and may make the same returnable the last return of *Easter* Term 1744, and may afterwards renew the same before the second Return of *Trinity* Term 1745.

Costs on *Scire facias*.

Formerly no Costs were recovered on a *Scire facias*, but now by 9 *Will.* 3. ch. 35. where any shall sue forth a *Scire facias*, and recover and have Judgment by Verdict, or upon Demurrer, the Plaintiff shall have Costs at the discretion of the Justices, and if the Plaintiff become Nonsuit, discontinue the Action, or a Verdict pass against him, the Defendant shall have Costs.

16 Nov. 1705.

R U L E.

To be taxed by the Officer.

Ordered that the Clerk of the Pleas Office of this Court do for the future, upon the Revival of any Judgment by *Scire facias*, where the party appears and pleads thereunto, Tax and allow the Plaintiff in such *Scire facias* Costs of such Revival, and the same to be inserted in the Judgment and Execution, pursuant unto a late Act of Parliament made in this Kingdom to that purpose.

In *Scire facias* on Judgment in Debt, if the Heir pray, the Parol may demur, Court may Assign Guardians to Plead.

* by Council.

By 8 *Geo.* 1. ch. 6. *pars.* where the Heir who shall be summoned in a *Scire facias* issued to have Execution on a Judgment obtained in an Action of Debt, shall pray that the Parol may demur during his Nonage, the Court shall on Motion for that purpose *, Assign two fit Persons or more, as Guardians for him, of

of his nearest Relations, (if any such appear to be proper Persons) which Guardians with the Guardian or Guardians appointed by the last Will of the Ancestor of such Heir (if any such there be) shall, within such reasonable Time as the Court shall appoint, not being less than six Months, plead to the *Scire facias* in behalf of such Minor, and Proceedings shall be had thereupon, as if such Plea had been pleaded by an Heir of full Age.

By 5 Geo. 2. ch. 4. if any Person shall sue forth any Writ of *Scire facias*, and shall recover and have Judgment where Plea of *Nul tiel* Record is pleaded, he shall recover his Costs of Suit, as heretofore he might, if such Recovery had been by Verdict or upon Demurrer.

Costs on Judgment on Plea of *Nul tiel* Record.

Ordered for the future, that no *Scire facias* do issue for the reviving any Judgment of 20 Years standing, without a Rule of Court for the Issuing of the same.

Nov. 20, 1701.
R U L E
No *Scire facias* to Issue on a Judgment of 20 Years without a Rule.

Ordered by the Court that for the future the Conussee or Conusees of any Judgment obtained above 20 Years, his or their Executors, Administrators, or Assigns, shall not be at liberty to issue any *Scire facias* to revive such Judgment, unless such Person or Persons shall first make an Affidavit, that the Debt mentioned in such Judgment or some Part thereof be then due.

June 4, 1746.
R U L E
Scire facias to Revive Judgments above 20 Years, and the Proceedings thereon.

Ibidem.

And then upon an Attorney's Motion upon such an Affidavit, the Court will make a Rule for reviving the Judgment, unless Cause be shewn to the contrary in four Days after Service of the Rule; and if no Cause be shewn in that Time, the Court on an Affidavit of the Service of the conditional Rule will make it absolute. But note, if the *Scire facias* be against the Heir and Ter-tenants, the Rule for reviving the Judgment is made absolute, on the first Motion and without any Service of it, as the Heir and Ter-tenants must be summoned.

Against Heir and
Ter-tenants.

Although the Judgment has been revived within twenty Years, or Part of the Money paid, yet if it be above a Year since the Judgment on the last *Scire facias*, the same Proceedings must be had.

And altho' the Judgment hath been revived within twenty Years, or altho' part of the Money hath been paid, yet by the Practice of this Court, if there be more than a Year since the Judgment upon the last *Scire facias*, the same Proceeding must be taken to revive the Judgment, which is not required in either of the other Courts, and really seems to be without any Foundation in Reason, and may, by the Delay it causes, be very prejudicial to the fair Creditor.

After Award of Execution on a *Scire feci*, Defendant cannot have Advantage of that by an Award of Execution upon a *Scire feci* returned, he is estopped for ever, and can never have an Opportunity or Means to let himself in to take an Advan-

Where the Defendant had Matter which he might have pleaded to the *Scire facias*, and has lost the Benefit of that by an Award of Execution upon a *Scire feci* returned, he is estopped for ever, and can never have an Opportunity or Means to let himself in to take an Advan-

Advantage of that Matter; but where it is an Award on two *Nibils* returned, he may relieve himself by *Audita Querela*, and the Court will save him that Trouble, and relieve him upon Motion, unless the Ground of his *Audita Querela* be a Release, or some such Matter of Fact, as may be proper to be tried. 1 *Salk.* 93, 264. *New Nat. Brev.* 230.

Scire facias against the Bail.

WHEN the Plaintiff hath obtained Judgment against the Defendant, where special Bail hath been given, the Plaintiff may (after a *non est inventus* is returned on a *Capias* against the Principal) prosecute the Bail; and the Manner of prosecuting the Bail is thus.

First, the Judgment being entered, the Plaintiff must sue forth a *Capias ad Satisfaciendum* against the Defendant, directed to the Sheriff of the same County where the Action was first laid; and upon Return thereof that the Defendant is not to be found, then he must procure a Writ of *Scire facias* against the Bail, to shew Cause, why the Plaintiff should not have Execution against them according to the Recovery, or Judgment so had against the Defendant.

Scire facias against the Bail, how to be prosecuted and the Proceedings.

Scire facias against the Bail.

If the Plaintiff can depend upon the Sheriff's returning a *Scire feci*, he need not be at the Expence of an *alias Scire facias*; and when the same is so returned, he is to bring it to the proper Officer of the Court, who thereupon will enter the Rules to plead of course, as upon a Declaration.

Ibidem.

But if he cannot depend upon the Sheriff's returning a *Scire feci*, he must then issue a first and *alias Scire facias* (as in Page 318) upon which, if the Sheriff returns two *Nibils* (which two *Nibils* amount to a *Scire feci*) he may thereupon move the Court for Judgment against the Bail; and then Judgment by Default may be entered against them in the proper Office *Instante*, for the Sum in which they became Bail, unless upon the Motion for Judgment, the Bail pray Time to plead, as in Page 318.

What Time the
Principal has to
surrender.

Altho' on the Return of the *Capias*, the Plaintiff is intitled to a *Scire facias* against the Bail, and the Recognizance in strictness is forfeited, yet if the Defendant renders himself any Time before, or on the Day of the Return of the *alias Scire facias* against the Bail, where two *Nibils* are returned; or on or before the Day of the Return of the first *Scire facias*, where a *Scire feci* is returned, *sedente Curia*, and Notice is given the Plaintiff or his Attorney of such Render, the Bail shall

Scire facias against the Bail.

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shall be discharged. 1 *Bacon*, 216.
1 *Salk*. 101. 1 *Roll. Abr.* 333, 334.

If the Defendant dies before the Return of a *Capias ad Satisfaciendum* against him, his Bail pleading the same may be discharged. 1 *Bacon*. 217. But if he dies after the Return of the *Capias*, this will not excuse the Bail. 1 *Roll. Abr.* 336.

The Death of the Defendant before the Return of the *Capias*, the Bail is discharged.

If the Principal surrenders himself, or the Bail render him up, this will discharge the Bail, and may be pleaded to the *Scire facias*. And of this Render or Surrender, the Plaintiff or his Attorney should have Notice, that the Plaintiff may, if he will, charge him in Execution; also that he may not be at any further Trouble, or Charge in Proceeding against the Bail. 1 *Roll. Abr.* 334, 335.
1 *Bacon*. 218.

Of rendering or surrendering of the Principal.

Where the Principal was in actual Execution, and a *Committitur* entered, yet after two *Scire facias*'s returned, and Judgment thereupon, the Court would not set it aside on Motion, for the Bail ought to have pleaded, that the Defendant was in Execution. *Skin*. 120.
1 *Bacon*. 218.

Ibidem.

So where the Principal surrendered himself before the Return of the *Capias*, yet the Plaintiff having had no Notice, and there being no Discharge of the Bail Piece or *Exoneratur* entered, and the Plaintiff having
pro

Ibidem.

Scire facias against the Bail.

proceeded to Judgment against the Bail, the Court would not relieve them, on Motion, but put them to their *Audita Querela*. 1 *Salk.* 101.

Ibidem.

But if through want of Notice, the Plaintiff is at further Charge against the Bail, that shall not vitiate the Surrender, but yet the Bail shall not be delivered, 'till they pay such Charges. 6 *Mod.* 238.

Ibidem.

If the Bail plead a Render of the Principal, they must conclude their Plea as appears by the Record; for this is not to be tried *per Pais*, but by the Record, 1 *Bacon.* 218.

Ibidem.

In a *Scire facias* against Bail, they cannot plead that before the Return of the second *Scire facias*, the Plaintiff prosecuted a *Testatum Capias* against the Principal, directed to the Sheriff of, &c. who took the Principal in Execution on the said Judgment and as yet has and detains him, for the Recognizance was forfeited before. 1 *Bacon*, 219. 2 *Mod.* 312. 1 *Vent.* 314, 315.

Prisoners escaping out of the four Court Marshalsea and retaken, their Bail may have a Writ to the Sheriff of any County to the Gaol whereof such

By the Stat. 8 *Ann.* ch. 7. for the retaking of Persons who had been Prisoners in the Four-Court Marshalsea and had made their Escape, it is among other Things enacted, that it shall be lawful for any Person that shall be Bail in any of her Majesty's Courts at *Dublin*, for any Person

Scire facias against the Bail.

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Person that shall be retaken and conveyed to any Gaol, by Virtue of the said Act, to prosecute out of such Courts where they shall be Bail, a Writ to the Sheriff of the County to the Gaol whereof such Prisoner retaken shall be committed, commanding such Sheriff to detain such Prisoner in Custody in discharge of his Bail; which Writ, with an Account whether he hath the Prisoner in his Custody, shall be returned at a Day therein mentioned, and the Delivery of such Writ to the Sheriff or his Deputy, shall be deemed an effectual Render of such Prisoner in Discharge of the Bail; and in Case such Sheriff or his Officer, shall after the Delivery of such Writ, suffer the Person to escape, they shall be liable to such Action as the Marshal of the four Courts is liable to, for permitting any Person to escape, who was committed upon Render in Discharge of their Bail.

Prisoners are committed, to detain them in Discharge of the Bail.

And by Sect. 4. every Sheriff, upon Request of such Persons being Bail as aforesaid, who shall deliver such Writ for detaining such Prisoners, and who shall pay the usual Fees for Return of Actions, shall return the Receipt of such Writ, and the Time of his receiving the same, and whether the Person so retaken, was then in his Custody, and in Default thereof, shall forfeit One Hundred Pounds, to be recovered in any of her Majesty's said Courts at *Dublin*, wherein

Sheriff offending or not making a proper Return to forfeit 100*l*.

no

Scire facias against the Bail.

no Effoi'en, &c. shall be allowed, and upon producing such Return to the Court, where such Bail shall be taken, such Court shall cause a *Reddidit se* to be entered upon the Bail Piece, which shall be as effectual, as if the Bail had actually rendered the Person of the Defendant to such Court.

A general Law
and to be most
beneficially con-
strued.

And by Sect. 5. this Act shall be a general Law, and it shall not be needful to set forth the same in pleading; and it shall be construed most beneficially, for the preventing of all the Mischiefs provided against.

General Issue
may be pleaded.

And by Sect. 6. if any Person shall be sued for putting in Execution any Power given by this Act, such Persons may plead the general Issue, and if the Plaintiffs shall be Nonsuit, or shall discontinue their Actions, or if a Verdict shall be given for the Defendants, or Judgment upon Demurrer, such Defendants shall have their treble Costs.

Treble Costs on
Nonsuit, &c.

For the general Understanding, at what Time the Bail may bring in the Principal, *vide* 1 Roll. Abr. 333, 334. Cro. Jac. 109. 165. 2 Brownl. 76. Cro. Eliz. 738. 3 Bullst. 182. Moor, 850. Pl. 1156. 2 Roll. Rep. 367, 382. 1 Leon. 58. Godb. 339. Lit. Rep. 194. Style, 134, 324, 425. 1 Jones, 139. 6 Mod. 238, 239.

And

And how the *Scire facias* is to be returned, and how many Days there must be between the *Teste* and Return. *Vide Cro. Eliz.* 738. 2 *Salk.* 599.

When a *Scire facias* is brought against the Bail, it must be *in that Behalf*; and where it is brought against the Defendant it must be *in this Behalf*. 2 *Salk.* 599.

Scire facias against the Defendant, or Bail how to be brought.

In Pleas to a *Scire facias*, the Defendant must not say he defends the Force and Injury, &c. Because, a *Scire facias* is no positive Charge of a Wrong, or Injury, but a Method of bringing the Defendant into Court, to shew Cause why Execution should not be awarded for the Plaintiff; and he is not in Law a Party to the Suit, till he appears: And the Case is the same, even where a *Scire facias* is sued upon a Judgment *Post Annum & Diem*. For it must be considered, that no *Scire facias* lay in personal Actions at common Law, but was given (as has been said) by the Stat. of *Westm.* 2. ch. 45. in lieu of a new Original upon the Judgment, and therefore the Parties to the Action and Judgment are at common Law out of Court; and the Courts of Common Law would take no Notice of such Judgment before that Statute, till the Plaintiff had brought the Defendant into Court, by a new Original, and compelled him to appear thereto; so that, as to any Suit, the Defendant by the *Scire facias* is not a Party, but may plead by *Venit & Dicit* only.

The Form of Pleas to all *Scire facias*.

If

In what Case
the Bail shall or
shall not pay
Costs.

If the Bail plead to the *Scire facias* they shall pay Costs, as they shall also on Judgment against them on Demurrer, or on Postea, and Verdict; but if Judgment goes against them by Default, or by Consent, they shall not pay any Cost, and shall only pay the Sum which the Plaintiff recovered against the Defendant.

Bill of Exceptions.

AT Common Law, a Writ of Error lay for an Error in Law apparent in the Record, or for an Error in Fact, where either Party died before Judgment, yet it lay not for an Error in Law, not appearing in the Record; and therefore, where the Plaintiff or Demandant, Tenant or Defendant, alledged any thing *Ore tenus*, which was overruled by the Judge, this could not be assigned for Error, not appearing within the Record, nor being an Error in Fact, but in Law; and so the Party grieved was without Remedy. And therefore,

Justices to allow
Bill of Exceptions
tendered to
them.

By the Statute *West. 2. viz. 13 Ed. 1 Ch. 31*. When one impleaded before one of the Justices, alledges an Exception, praying they will allow it, and if they will not, if he that alledges the Exception writes the same, and requires the Justices will put to their Seals, the Justices shall so do; and if one will not, another shall

shall ; and if, upon Complaint made of the Justices, the King cause the Record to come before him, and the Exception be not found in the Roll, and the Plaintiff shew the written Exception, with the Seal of the Justices thereto put, the Justice shall be commanded to appear at a certain Day, either to confess or deny his Seal ; and if he cannot deny his Seal, they shall proceed to Judgment according to the Exception as it ought to be allowed or disallowed. 1 *Bacon Abr. of the Law*, 325.

Judgment may
be given if not
enrolled.

In the Construction of this Statute, the following Opinions have been holden.

That the Statute extends to the Plaintiff as well as the Defendant, also to him who comes in *Loco tenentis*, as one who prays to be received, or the Vouchee ; and to all civil Actions, whether real, personal, or mixt. But it does not extend to one not Party to the Record as Bailiff of a Franchise, who demands Conusance. 2. *Inst.* 427.

To what the
Statute extends.

The Statute extends not only to all Pleas, dilatory and peremptory, but to Prayers to be received, Oyer of Records and Deeds, &c. also to Challenges of Jurors, and any material Evidence offered and over-ruled. 2 *Inst.* 427. *Dyer*, 231. *Pl.* 3. *Raym.* 486.

Ibidem.

Judges not oblig-
ed to seal the
Bill if a Falsity
be inserted in it.

But if with respect to those, a Falsity be inserted in the Bill, the Judges are not bound to seal it, but may Return the special Matter ; for the Command of the Writ is conditional, *quod si ita est, tunc sigilla vestra apponatis.* 1 Bacon 325.

Bill of Excepti-
ons in what
Cases.

Where the Court refuses to allow a Matter of Evidence which ought to be allowed ; or will admit a Matter to be given in Evidence which ought not to be allowed in Evidence ; or will declare that a Matter of Evidence is material and conclusive which is not so, or the reverse ; in such Cases, &c. a Bill of Exceptions will properly lie to the Opinion of the Court.

Bill of Excepti-
ons on a Trial
by *Nisi prius* and
the Proceedings.

When a Bill of Exceptions is taken to the Opinion of the Judge on a Trial by *Nisi prius*, the Exceptions are to be argued before the Judges of the Court from whence the Record issued : For as the Judge upon such Trials cannot give Judgment, but the Judgment must be given by the Court above upon the Return of the Postea, if therefore on such Trials a Bill of Exceptions be tendered and allowed, the Court will, upon Application for that purpose, defer their Judgment until the Bill of Exceptions be disposed of ; and will either over-rule the Exceptions and give Judgment, or set aside the Verdict and grant a new Trial as the Case is.

But

But when a Bill of Exceptions is taken to the Opinion of the Court upon a Trial at Bar, the Court will (as usual) immediately give Judgment, saving that Point to which the Bill of Exceptions is taken; and therefore, in this Case, the Bill of Exceptions with the Record of the Judgment are to be removed by Writ of Error into the *Exchequer* Chamber, there to be argued before the Judges thereof, who will either affirm or reverse the Judgment as they see Reason: Besides, as a Trial at Bar is had in presence of all the Judges of the Court, it should seem absurd to argue the Exceptions before them, when they had already given their Opinion upon the Matter of Exception. *Sed Quær.* for in the Case of *Lee Hill* and his Wife against *Geairakes, Hill.* 1707, in this Court, a Bill of Exceptions was taken to the Opinion of the Court on a Trial at Bar, and the Exceptions were Argued before the same Judges who tried the Cause.

The like on a Trial at Bar.

If a Bill of Exceptions be taken to the Opinion of the Court upon a Trial by *Nisi prius* where the Record thereof is in this Court, when the same is settled and agreed upon by the Parties, and allowed off by the Judge who tried the Cause, it is to be engrossed on Parchment and to be delivered to the Register (who is the Judge's Clerk) and he is to affix the same to the Postea, and get them both signed by the Judge of *Nisi*

Bill of Exceptions on a Trial by *Nisi prius*, and the proceedings thereon.

Z. 2

prius:

Bill of Exceptions.

prius: When this is done, the Council for the Party who brings the Bill of Exceptions is to move this Court to have the same received and filed and made Part of the Record with the *Postea* in the Cause.

Ibidem.

Then the Party who obtains the Verdict, may, the same Day, move this Court by his Council to have a Law-Day appointed for reading the Record of the Bill of Exceptions, and may also pray that the Party excepting may be at the Cost of enrolling it; or the Officer will upon application of the Party who has the Record made up, enter a Rule of course in the Rule-Book to appoint a Day for reading of the Record, as in the Case of a Demurrer.

It was Ordered in the Case of Lessee of *Usher* and *Usher* against *Dillon* and *Fortescue* in this Court, *Mich. Term* 1742, that the Judges should be furnished with Books at the joint Expence of both Parties. So Ordered also in the Case of the Lessee of *Straisford* against *Harrington* in this Court 18th *June* 1750.

When the Record of the *Postea*, and Verdict and Bill of Exceptions is made up and read and opened by Council, the Court will then on Council's motion appoint a Day for arguing the same.

If

If the Party excepting delays to bring ^{Ibidem.} in the Bill of Exceptions, then Council on Behalf of the Party who obtained the Verdict, may, on Application to the Court, obtain a Rule, that the Exceptions be brought in by a short Day, or, that the Party who obtained the Verdict may be at Liberty to move for Judgment on the Postea.

But the Court on Council's Motion, ^{Ibidem.} and on Cause shewn, will enlarge the Time for bringing in the Bill of Exceptions.

In the Case of the Lessee of *Sberlock* against the Earl of *Angl-sea* in this Court *Easter Term*, 1682, the Court gave the Defendant Time to a certain Day, to bring in his Bill of Exceptions, or Judgment for the Plaintiff peremptorily.

The Party excepting, is to serve the ^{Ibidem.} opposite Party, or Party who obtained the Verdict with a Copy of the Draft or Dominicals of the Bill of Exceptions; and if any Objections be made thereto, they shall be settled by the Judge who tried the Cause. And if the Party who obtained the Verdict, shall make any Delay in returning the Draft or Dominicals, the Party excepting, may put Rules on him to return the same in a short Day, or that the Bill of Exceptions may be made up according to the Draft

Bill of Exceptions:

or Dominicals, as in the Case of a special Verdict. Page 280.

Ibidem.

In the Case of the Lessee of *Defmi-nyer's* against the Bishop of *Killalla* in this Court, *Easter* Term, 1686, the Defendant obtained a Verdict at the Assizes, the Plaintiff brought a Bill of Exceptions, and the Defendant being served with the Draft, or the Dominicals of the Exceptions, in order to have them settled, and delaying to return them, the Plaintiff on Council's Motion obtained an Order for the Defendant to bring in the Bill of Exceptions the next Day, or that Judgment should go against the casual Ejector.

Ibidem.

And in the same Case, it was ordered, that Council for the Plaintiff and Defendant should attend the Judges in the *Exchequer* Chamber, to settle and ascertain the Bill of Exceptions. *Trin.* 1686.

Ibidem.

When Counsel have argued on Behalf of the Exceptions, the Court upon Motion of Council will appoint another Law Day (if there be Occasion) for the Council of the opposite Party to argue against the Exceptions.

Ibidem.

In the aforesaid Case of the Lessee of *Usber* and *Usber* against *Dillon* and *For-tescue*, in this Court *Mich.* Term, 1742, the Defendant took Exceptions to the
Opi-

Opinion of the Judge, on a Trial by *Nisi prius*; and having given some Delay in settling the Bill of Exceptions, the Judge of Assize signed the Postea and gave it to the Plaintiff's Attorney, who thereupon moved for Judgment: And the Defendant's Time for Speaking in Arrest of Judgment, being almost expired, the Court upon Council's Motion enlarged the Time to the next Law Day, for the Defendant's Speaking in Arrest of Judgment: On the next Law Day, the Defendant moved by his Council upon several Affidavits, (settling forth the Cause of the Delay, in setting the Bill of Exceptions) that the Plaintiff might stop from moving for Judgment on the Postea and Verdict, and for Liberty to bring in a Bill of Exceptions taken on the Trial by *Nisi prius*; and thereupon, the Court ordered, that the Motion should stand over to the next Law Day; and on the next Law Day upon Motion of the Defendant's Council, the Court ordered the Bill of Exceptions to be received, and made Part of the Record with the Postea returned in the Cause.

If the Plaintiff obtains a Verdict on a Trial by *Nisi prius*, and the Defendant brings a Bill of Exceptions; or if the Defendant obtains a Verdict, and the Plaintiff brings a Bill of Exceptions, if in either Case, the Bill of Exceptions be adjudged good, the Court above will set

Bill of Exceptions if adjudged good, the Verdict to be set aside.

side the Verdict, and in either Case, the Plaintiff may move by his Council *Instante* for a *Venire facias de Novo*, and the Court will grant it to him. Lessee *Desminyer's* against Bishop of *Killalla*, *Hillary* Term 1686, in this Court.

If over-ruled
Judgment to be
given for the Par-
ty who obtained
the Verdict.

But if the Court above over-rule the Bill of Exceptions, they will give Judgment for the Party who obtained the Verdict *Instante*, and without further Motion. But if the Party against whom the Judgment is given, thinks himself aggrieved, he may bring his Writ of Error to remove the Judgment and Proceedings into the *Exchequer* Chamber, and prosecute this Writ of Error as directed in Page 368, &c. See *Sherlock* against Earl of *Anglesea*, *Trin. Term*, 1682. See *Broughall* against *Rawlins*, *Hillary* Term, 1696. See *Usher* and *Usher* against *Dillon* and *Fortescue*, *Easter Term*, 1743, in this Court.

Bill of Exceptions on a Trial at Bar and the Proceedings.

When a Bill of Exceptions is tendered on a Trial at Bar, and the same is settled by the Parties, and allowed by the Judge, then a Motion must be made by Council on Behalf of the Party taking the Exceptions, that the same may be received and filed and made Part of the Record with the *Postea* in the Cause; and when a Rule is conceived for this Purpose, then the Record of the *Postea* and Verdict and Bill of Exceptions, are to be removed by Writ of Error into the *Exchequer* Chamber,

there

there to be argued before the Judges thereof, who will affirm or reverse the Judgment as they see Reason.

And when the Record of the Postea Ibidem. and Verdict and Bill of Exceptions is made up, the Party who obtained the Verdict may move by his Attorney, that the Party who brings the Bill of Exceptions may transmit the Record to the *Exchequer* Chamber; and if the same be not transmitted in four running Days (Sundays and *Dies non* excepted) Execution may issue without further Motion. See page 370.

If the Party excepting on such Trial Ibidem. at Bar, shall be guilty of any Delays in bringing in the Bill of Exceptions, the Attorney for the Party who obtained the Verdict, may, upon Motion, obtain a Rule, that the Bill of Exceptions shall be brought in by a short Day, or that Execution may issue on the Judgment without further Motion.

If one offers to Demur upon Evidence, and is over-ruled, and after Judgment a Writ of Error is brought, this cannot be assigned for Error, but it is a proper Case for a Bill of Exceptions. Demurrer upon Evidence over-ruled, the proper Remedy is by Bill of Exceptions. 1 *Bacon*, 326.

If a Judge erroneously over-rule a New Trial. Matter offered in Evidence, tho' the tendering on erroneously

Over ruling matter of Evidence.

dering of a Bill of Exceptions, be the most regular Method, yet it is good Cause of a new Trial. *Ibid.*

The Justices must seal the Bill, and may do it after Judgment.

The Party must pray the Justices to put their Seals; but if they deny it, they may be commanded, and may do it after Judgment. *Trials per Pais*, 363.

It is a Contempt to refuse to seal the Bill.

All the Justices ought to seal the Bill of Exceptions, yet if one doth it, it is sufficient; but if they all refuse, it is a Contempt in them all, for which the Party grieved, may, on Petition to the Lord Chancellor, have a Writ grounded upon the Statute commanding them to put their Seals, &c. 2 *Inst.* 427. 2 *Lev.* 237.

Action may be against them, for refusing to seal it.

A Petition was exhibited to the Lords in Parliament to oblige the Judges to sign, and it was said, that the proper Remedy against them was an Action grounded on the Statute, which was to be tried by a Jury. *Vide Show. P.* 6. 116. 1 *Bacon. Abr.* 326.

Exception when taken and disallowed, the Substance of it to be reduced to Writing.

Although no Time be appointed by this Act when the Justices shall put their Seals, yet the Nature and Reason of the Thing require the Exception should be reduced to Writing when taken and disallowed, like a special Verdict, or a Demurrer to Evidence; not that they need be drawn up in Form, but

but the Substance must be reduced to Writing whilst the Thing is transacting; because it is become a Record, and the Party must pray that the Justices may put their Seals to the same before Judgment; but if they deny it, they may be commanded after Judgment to put their Seals, and then the putting of their Seals after Judgment, shall be sufficient. 2 Inst. 427.

When the Bill is signed, there goes out a *Scire facias* (to the Judge who signed it) *ad Cognoscendum scriptum*; and the *Scire facias* to the Judge, and his Return with the Bill must be entered on the Issue Roll and made Part of the Record, which is to be removed by a Writ of Error. 1 Lutw. 905, 906. 1 Bacon. Abr. 327.

Scire facias ad Cognoscendum Scriptum.

Record to be removed by Writ of Error.

Where the Record is in the same Court, there is no Occasion for a *Scire facias ad Cognoscendum scriptum*. 2 Jones, 117. 2 Lev. 237.

No *Scire facias ad Cognoscendum* when the Record is in the same Court.

If the Judge dies, there lies a *Scire facias* against his Executors; for the Death of the Judge is the Act of God, which shall not Prejudice the Party, nor make the Purview of the Statute to be of no Force. 2 Inst. 428.

On the Death of a Judge, a *Scire facias* against the Executors.

If the Judge denies his Seal, the Party may prove it by Witnesses. *Ibid.*

Proof of the Judge's Seal by Witnesses.

Tho'

Heirs or Executors of the Party may have a Writ of Error, on a Bill of Exceptions.

Tho' the Party grieved be dead, his Heirs, or Executors, may have a Writ of Error upon a Bill of Exceptions. 2 *Inst.* 427.

No Motion in Arrest of Judgment, on the Point on which the Bill of Exceptions is allowed.

When a Bill of Exceptions is allowed, the Court will not suffer the Party to move any Thing on Arrest of Judgment on the Point on which the Bill of Exceptions was allowed; for his proper Redress is by Writ of Error; and it is presumed, that the Court was satisfied in the Point, when the Party tendered his Bill of Exceptions. 1 *Vent.* 366, 367. 1 *Bacon. Abr.* 327.

No Diminution to be alleged.

No Diminution can be alleged on a Bill of Exceptions; for the Parties are confined to the Matter in the Bill. *Trials per Pais*, 363.

When Bill sealed Writ of Error.

When the Justices have sealed the Bill of Exceptions, the Party grieved shall have a Writ of Error, and may assign Error upon that Bill so sealed, and also in the Record, or in one of them, at his Pleasure. *Vide H. N. B.* 21. *New Trials per Pais*, 365.

The Intent of the Bill of Exceptions, and to be allowed in all Courts.

Note, this Bill is to prevent the Precipitancy of the Judges, and ought to be allowed in all Courts, and in all Places of Pleadings, and may be put in at any Time before the Jury have given their Verdict. But it is not often used, the Prudence of the Judges inducing them to

to recommend special Verdicts, in Cases of Doubt and Difficulty. *Trials per Pais*, 365.

Amendment and Jeofail.

AT Common Law, there was but little room for Amendments, which appears by the several Statutes of *Amendments* and *Jeofails*; for, (says *Britton*,) the Judges are to record the Parols deduced from them in Judgments: Also says he, *Ed. 1.* granted to his Justices to record the Pleas pleaded before them, but are not to erase their Records, nor amend them, nor record against their Inrollment, nor any way suffer their Records to be a Warrant to justify their own Misdoings. 1 *Bacon*, 89.

Little Rules for Amendments at Common Law.

Hence it appears that regularly at Common-Law, neither false Latin, the Omission of a Word, Syllable, or Letter, or other Defect or Variance from the approved and legal Form were amendable. 1 *Bacon*, 89.

But notwithstanding this general Rule, all Mistakes were amendable the same Term; because it is a Roll of that Term, and in the Breast of the Court during the whole Term; and when a new Roll might be brought in the Cause, consequently

Rolls amendable the same Term.

quently the same Roll may be amended.
1 *Bacon*. 89.

A Record Defective by the Misprision of a Clerk shall be amended.

The tying down the Judges not to alter their Records after the first Term was found very inconvenient, and many Judgments were reversed by the Misprision of Clerks, &c. Wherefore it was enacted by 14 *Ed.* 3. ch. 6. That by the Misprision of a Clerk in any Place where-soever it be, no Process shall be annulled, or discontinued by mistaking in Writing one Syllable, or one Letter too much, or too little; but as soon as the Thing is perceived by Challenge of the Party, or in other Manner, it shall be hastily amended in due Form, without giving Advantage to the Party that challengeth the same because of such Misprision.
1 *Bacon*, 90.

The Judges may amend Records or Process, after Judgment given.

The Judges construed this Statute so favourably for the Suitors, that they extended it to a Word; but they were not agreed whether they could make these Amendments as well after Judgment as before, which occasioned, 9 *Hen.* 5. ch. 4. by which it is declared, that the Judges shall have the same Power, as well after, as before Judgment, as long as the Record or Process is before them. And this Statute is confirmed by 4 *Hen.* 6. ch. 3.

Though these Statutes gave the Judges a greater Power than they had before, yet

yet it was found that they were too much restrained having Authority to amend nothing but Proseses, which they did not contrive in a large Signification, so as to comprehend the whole Proceedings but confined it to the Mesne Process and Jury Process, wherefore to enlarge the Authority of the Courts,

By the 8 *Hen.* 6. ch. 12. it was enacted, that for Error assigned in any Record, Process, or Warrant of Attorney, original Writ, or judicial Panel, or Return, by rasing or interlining, or by Addition, Subtraction, or Diminution of Words, Letters, Titles, &c. no Judgment or Record shall be reversed or annulled, but the Judges in any Record, Process, Word, Plea, Warrant of Attorney, Writ, Panel, or Return in Affirmance of Judgment, may amend all that which to them seems to be the Misprision of the Clerk (except Appeals, Indictments of Treason, Felony, and Outlawries of the same) and the Substance of the proper Names, Surnames and Additions left out in Originals and Exigents contrary to the first *Hen.* 5. and other Writs, containing Proclamation, so that by such Misprision of the Clerks no Judgment shall be reversed or annulled.

No Judgment or Record shall be reversed nor avoided, for any Writ, Return, Process, &c. rased or interlined.

The Judges may reform all defects in Records which be the Misprision of the Clerks.

Where defects in Records may not be amended.

And if any Record, Process, &c. be certified defective, the Parties in Affirmance of Judgment, may alledge the Variance between the Record and Certificate, and

and if found and certified it shall be amended.

The Judges may amend Records and Processes and the Returns of Sheriffs, &c. thereon.

By the 8 *Hen.* 6. ch. 15. the Judges in any Records or Process before them, by Error or otherwise or in Returns of Sheriffs, Coroners, Bailiffs of Franchises or others, may amend the Misprision of the Clerks of the Courts, or of the Sheriffs, Coroners, their Clerks and other Officers whatsoever in Writing a Letter or Syllable too much, or too little.

As these Statutes extended only to what the Justices should interpret the Misprision of their Clerks, and other Officers, it was found by Experience that many just Causes were overthrown for Want of Form, not aided by any of these Statutes, though they were good in Substance; wherefore for further Relief of Suitors,

No Verdict to be set aside for any Mispleading, lack of Colour, &c.

The 33 *Hen.* 8. ch. 3. enacts, That in Actions and Suits, after Issue tried by Verdict, there shall be Judgment given (by the Judges who ought to give the same) notwithstanding any Mispleading, lack of Colour, insufficient Pleading, or Jeofail, any Miscontinuance or Discontinuance, or misconveying of Process, misjoining of Issue, lack of Warrant of Attorney for the Party against whom the said Issue shall be tried; and such Judgment shall stand in Force according to the said Verdict (without any Reversal by

by Writ of Error) as though no such Fault had been committed.

Provided that this Act shall not extend to bind any Justice or Justices Judge or Judges, to give Judgment in any Suit depending between the King and any of his Subjects, nor that such erroneous Judgment (upon the said Defaults, Negligence or Omission) to be given against the King, shall otherwise bind him, but as the same should have done before the making of this Act: Nor extend to any Exceptions to be moved before any Judge or Judges, and not allowed by them, whereupon a Bill thereof shall be sealed, or refused to be sealed, but the same to be of the same Force as it was before the making of this Act.

Not to extend to the King.

Nor to any Bill of Exceptions.

This Statute though much more extensive than the others. and though it very much enlarged the Authority of the Judges in Amendments of Mistakes, yet it remedied no Omission but one, which was the Party's own neglect in not filing his Warrant, which should not after Verdict prejudice the right of the Party that had prevailed; therefore to remedy the Omissions which the prevailing Party might have been guilty of, as well as the other Side. 1 Ba. 91.

By 10 Cha. ch. 1. 2. *Seff.* ch. 12. it is enacted, that after Verdict given in any Action,
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No Stay of Judgment for lack of Form, &c.

Amendment and Jeofail.

in any Court of Record, Judgment thereupon shall not be stayed, or reversed by Reason of any Default thereof in Form, or lack of Form, touching false Latin, or Variance from the Register, or other Default in form in any Writ, original or judicial; or by Reason of any imperfect or insufficient Return of any Sheriff, or other Officer, or for want of any Warrant of Attorney, or for Default in Process upon, or after any Aid Prayer, or Voucher.

Also after a Verdict as aforesaid, the Judgment shall not be stayed, or reversed, by Reason of any Variance in Form only between the original Writ, or Bill, and the Declaration, Complaint, or Demand; or for lack of any Averment of any Life or Lives, of any Person or Persons, so that upon any Examination, the said Person be proved to be in Life; or by Reason that the *Venire facias*, *Habeas Corpora*, or Distringas, is awarded to a wrong Officer, upon any insufficient Suggestion; or by Reason that the *Visne* is in some part misawarded, or sued out of more Places, or of fewer than it ought to be, so as some one Place be right named; or by Reason that any of the Jury which tried the said Issue is misnamed, either in the Name, Surname, or Addition in any of the said Writs, so as upon Examination it be proved to be the same Man that was meant to be returned; or by Reason that there is no Return upon any of the said Writs, so as the Panel of the Names
of

of the Jurors be returned, and annexed to the said Writ ; or for that the Sheriff's Name, or other Officer's Name, having the Return thereof, is not set to the Return of any such Writ, so as upon Examination it be proved, that the said Writ was returned by the Sheriff, or under-Sheriff, or such other Officer ; or by Reason that the Plaintiff in any *Ejectione firmæ*, or in any personal Action or Suit, being an Infant under the Age of Twenty-one Years, did appear by Attorney therein, and the Verdict passed for him. But this Act is not to extend to any Writ, Bill, or Action, or Information upon popular or penal Statutes, nor to any Suit of appeal of Felony, or Murder, to any Indictment or Presentment of Felony, Murder or Treason.

To what this Act does not extend.

The main Design of this Statute, was to help any Mistake in the Jury Process ; but there were several other Things still to be supplied, and several others to be adjudged Form, which were always construed to be Matters of Substance, and consequently not aided by any of the former Statutes, wherefore the 17 and 18 Ch. 2. was made, which was taken from the *Englisb* Act, 16 and 17 Ch. 2. ch. 8. which *Twissdon* calls the *Omnipotent Act*.

The design of the Statute.

And by the said Stat. 17 and 18 Ch. 2. ch. 12. After a Verdict in any of the King's Courts of Record at *Dublin*,

No Judgment to be stayed for want of form of Pledges.

Judgment thereupon shall not be stayed or reversed, for Default in Form, or Lack in Form, or by Reason that there are not Pledges, or but one Pledge to prosecute, returned upon the original Writ, or because the Name of the Sheriff is not returned thereon, or by Default of Pledges being entered upon any Bill or Declaration, or for Default of alledging the bringing into Court of any Bond Bill, Indenture, or other Deed whatsoever, mentioned in the Declaration or other Pleading; or for Default of Allegation of the bringing into Court of any Letters testamentary, or Letters of Administration; or by Reason of the Omission of *Vi et Armis*, or *Contra pacem*, or for or by Reason of the mistaking the Christian-name, or Surname, of the Plaintiff, or the Defendant, Demandant, or Tenant, Sum or Sums of Money, Day, Month, or Year, by the Clerk in any Bill, Declaration, or Pleading, where the right Name, Surname, Day, Month, or Year, in any Writ, Complaint, Roll, or Record preceding, or in the same Roll or Record where the Mistake is committed, is, or are once truly and rightly alledged, whereunto, the Plaintiff might have demurred, and shewn the same for Cause; nor for Want of the Averment of *hoc paratus est verificare*, or *hoc paratus est verificare per Recordum*; or not alledging *pro ut patet per Recordum*; or for that there

there is no right *Venue*, so as the Cause was tried by a Jury of the proper County, or Place where the Action is laid; nor any Judgment after Verdict, or Confession by *Cognovit Actionem*, or *Relicta Verificatione*, shall be reversed for Want of *Misericordia*, or *Capiatur*, or by Reason that a *Capiatur* is entered for a *Misericordia*, or a *Misericordia* is entered, where a *Capiatur* ought to have been entered; nor for that *Ideo Concessum est per Cur.* is entered for *Ideo Consideratum est per Cur.* nor for that the Encrease of Costs after a Verdict in any Action are not entered to be at the Request of the Party for whom the Judgment is given; nor by Reason that the Costs of any Judgment whatsoever are not entered, to be by Consent of the Plaintiff, but that all such Omissions, Variances, and Defects, and all other Matters of the like Nature, not being against the Right of the Matter of Suit, nor whereby the Issue or Trial are altered, shall be amended by the Justices or Judges of the Courts where such Judgments shall be given, or whereunto the Records shall be removed by Writ of Error.

Proviso, not to extend to Appeals of Felony, or Murder, Indictments, Presentments, or Suits upon penal Statutes, other than concerning Customs and Subsidies of Tunnage and Poundage. Made perpetual by 7 *Will.* 3. ch. 7.

To what this Act does not extend.

Death of Plaintiff and Defendant between Verdict and Judgment shall be no Error.

By 7 *Will.* 3. ch. 7. in all Actions, real, and personal, or mix'd, the Death of either Party between the Verdict, and the Judgment shall not be alleged for Error, so as Judgment be entered within two Terms after such Verdict.

The above Statutes being chiefly calculated to aid Imperfections after Verdict, and the 10 *Cha.* 1. ch. 11. aiding Defects in Form only on a general Demurrer; it was thought advisable, to enlarge the Authority of the Courts further in Favour of Suitors. And therefore,

No Advantage to be taken for any immaterial Traverse, or Default of entering Pledges.

By 6 *Ann.* ch. 10. *pars.* no Advantages shall be taken for any immaterial Traverse, or for Default of entering Pledges upon any Bill or Declaration, or for Default of alleging the bringing into Court, Letters Testamentary, or Letters of Administration; or for the Omission of *Vi et Armis*, &c. *Contrapacem*, or either of them, or for Want of Averment of *hoc paratus est verificare*, or *hoc paratus est verificare per Recordum*, or for not alleging *prout patet per Recordum*; but the Court shall give Judgment according to the very Right of the Cause, without regarding any such Defect, or other Matter of the like Nature, except the same shall be specially shewn for the Cause of Demurrer.

And

And by the said Act, all the Statutes of Jeofails shall be extended to Judgments entered upon Confession, *nihil dicit*, or *non sum informatus*, in any Court of Record; and no such Judgment shall be reversed, nor any Judgment upon any Writ of Enquiry of Damages executed thereon, be staid or reversed, by Reason of any Matter whatsoever which would have been aided by any of the said Statutes of Jeofails, in Case a Verdict had been given, so as there be an original Writ, Bill, or Declaration, and Warrants of Attorney duly filed, according to the Law now used.

All Statutes of Jeofails extend to Judgments by Confession, *nil dicit* or *non sum Informatus*.

This Act not to extend to any Suit of Appeal of Felony, or Murder, nor to any Indictment or Presentment of Felony, Murder, or other Matter, nor to any Action upon penal Statutes.

Not to extend to Appeals of Felony or Murder.

This Statute, and all the Statutes of Jeofails shall extend to all Suits in any of the four Courts at *Dublin*, for Recovery of any Debt immediately owing, or any Revenue belonging to her Majesty, &c. and shall also extend to all Courts of Record in the Kingdom.

To extend to the Queen and all Courts of Record.

Notwithstanding the great Enlargement of the Power of the Judges, by the above recited Statutes in amending Writs, Processes, &c. yet none of them were thought to extend to Writs of Error

ror, and the rather, because such Amendment would not be in Affirmance of the Judgment, but it being found that defective Writs of Error occasioned great Delay of Justice.

Where Writs of Error may be amended.

Judgment after Verdict, not to be stayed for any Fault in Form or Substance, in any Bill or Writ, or Variance in such Writ from the Declaration.

By the 6 *Geo. 1. ch. 6.* all Writs of Error now depending, or to be brought, wherein there shall be any Variance from the original Record, or other Defect, may be amended and made agreeable to such Record, or the Transcript thereof, by the Court where the same are returnable. And where any Verdict hath been, or shall be given in any Action, &c. in any Court of Record, the Judgment thereupon, shall not be stayed or reversed for any Fault in Form, or Substance, in any Bill, or Writ, or for any Variance in such Writs from the Declarations, or other Proceedings. Nothing herein contained, to extend to any Appeal of Murder, or any Process upon any Indictment, Presentment, or Information.

By Stat. 11 *Geo. 2. ch. 6. pars.* (by which all Law Proceedings are to be in English) all Statutes for reforming and amending Delays, arising from Jeofails, shall extend to all Forms and Proceedings in Courts of Justice, (except in Criminal Cases) when the Form and Proceedings are in English. And every Error and Mistake which might be amended by any Statute of Jeofails, if
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the Proceedings were in Latin, shall, when the Proceedings are in English, be amended, if of the like Nature, by the Statutes of Jeofails now in Force. And this Clause shall be construed in all Courts of Justice, in the most beneficial Manner for the Ease of the Parties, and to prevent frivolous and vexatious Delays.

And by the said Statute, all clerical Mistakes in Pleadings, may be amended either before or after Judgment, upon Payment of reasonable Costs.

All Declarations and Pleadings, are to be amended by Consent, or Order of the Court, (so it does not change the Action, or alter the Nature of the Issue) paying Cost.

Declarations and Pleading amendable.

A Verdict cures not only such Defects as may be called artificial Defects, and come within the Purview of the several Statutes of Amendment and Jeofails, but also natural Defects, or the Omissions of the Parties in their Allegations, which must be presumed to have been given in Evidence to the Jury, otherwise they could not have found a Verdict for the Party. 1 *Bacon*, 101.

Verdict what it cures.

The chief Intent of all the Statutes of Jeofails seems plainly to be, that the wrong Pleading of any collateral Matters, not essential to the Action, should after

The chief Intent of the Statute of Jeofails.

after the Expence of a Trial and Verdict for the Party, be aided ; but not to extend to Matters of Substance, or whatever is essential to the Gift of the Action ; for this would have ruined all Proceedings in the Courts of Justice : Besides had such essential Part been set forth, it might occasion a contrary Verdict, neither can the Jury be attainted for a false Verdict on the uncertain allegations of the Parties ; for it cannot appear whether the Damages given by the Jury be proportionable to the Demand or not. 1 *Bacon* 102.

What Things
cannot be cured
after Verdict.

Whatever therefore appears essential to the Gift of the Action cannot be cured after Verdict ; for the Law requires that all substantial Facts should be laid in proper Time and Place, so that the Defendant may traverse them distinctly if he pleases ; for as he may traverse the whole, so he may traverse each substantial Part, in Order to put the Weight of the Cause on any one Thing that will put an End to the Cause. 1 *Bacon*, 102.

Surplusage after
Verdict does not
vitate.

Surplusage does not vitiate after the Verdict, according to the Maxim, *Utile per inutile non vitiatur* ; and therefore, if such Surplusage is repugnant to what is before alledged it is void : As if in *Trover*, the Plaintiff declares that he was on the fourth of *March* possessed of Goods, and that afterwards, *scilicet* the first of *March*, they came to the Defendant's

dant's Hands, who converted them. *Cro.*

Jac. 97. 1 *Bacon*, 102.

But if there be a Repugnancy in any Point material, there it is not helped by a Verdict, unless the Verdict appears to have been given on a different Part of the Declaration. 1 *Bacon*, 102.

Repugnancy in Points material not helped by Verdict.

If the Replication be repugnant to the Declaration, it makes the Declaration bad; because the subsequent Pleading falsifies the Declaration; so if the Rejoinder falsifies the Bar, the Bar is vicious. *Cro. Jac.* 264. 1. *Saund* 116. 226.

Ibidem.

As the Plaintiff's Action must have all Essentials necessary to maintain it, so the Defendant's Bar must be substantially good; and if the Gift of the Bar be naught, it cannot be cured by a Verdict found for the Defendant; but if it had been found for the Plaintiff, he shall have Judgment either for the badness or falseness of the Bar; but if it be bad only in Form, a Verdict will cure it; and if the Gift be traversed, all collateral Circumstances will be intended after a Verdict. *Cro. Eliz.* 778. 1 *Bacon*, 103.

Of insufficiency in the Defendant's Bar, and when cured and when not cured by Verdict.

A Verdict cannot help an immaterial Issue; for if what is material in the Pleadings be not put in the Issue, it is not made necessary to be proved on that Trial; or if it be alleged and proved, yet if it appears insufficient so as not to be

An immaterial, or an insufficient Issue not helped by Verdict but an informal Issue is.

be decisive between the Parties, the Verdict will be no good Foundation for the Judgment, but an informal Issue is helped by the Verdict. 1 *Lev.* 32. *Carth.* 371.

Immaterial and
informal Issue
what

An immaterial Issue is where what is materially alleged by the Pleadings is not traversed, but an Issue taken upon such a Point as will not determine the Merits of the Cause: And an informal Issue is where it is not traversed in a right Manner. *Cro. Eliz.* 227. 2 *Mod.* 137.

Issue upon a
Point impossible
in Substance or
in Form, the first
not curable by
Verdict, the lat-
ter may

If an Issue be on a Point that is impossible in Substance and Nature of the Thing, it is not cured by the Verdict; but if it be only impossible in the Manner and Form of it, a Verdict will cure it. See 1 *Bacon* 104.

Improper Plea
aided after Ver-
dict in an action
of Debt.

In any action of Debt, if *not Guilty* be pleaded, and there be a Verdict for the Plaintiff, it shall be aided by the Statute; because being an ill Plea, and a false One, the Plaintiff ought to have his Judgment, both for the badness of the Plea, and for it's Falselhood: But if the Verdict had been for the Defendant, yet the Plaintiff should have Judgment, because the Declaration is not answered by the Plea. *Cro. Eliz.* 773. 2 *Jones* 184.

And

Amendment and Jeofail.

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And so where *not Guilty* was pleaded to an *Assumpsit*, yet the Plaintiff had Judgment though an improper Plea. *Cro. Eliz.* 470. *Palm.* 393. 2 *Roll. Rep.* 368.

So in an Action on the Case.

Of amending the Judgment.

IT is a general Rule, that the Court will make no Amendment that will defeat a Judgment; the Statutes allowing Amendments in Affirmance of Judgments only. 1 *Leon.* 134. 8 *Co.* 158. *Carth.* 158. 367. 520. *Bul.* 105.

All Amendments of Judgments to be in Affirmance of Judgments not to defeat them.

But in Affirmance of the Judgment, the Judgment itself may be set right, and amended by another Part of the Record, in a Fact, which appears to be the Mistake of the Clerk, as in the Mistake of the Names of the Parties, &c. 1 *Roll. Abr.* 337. See *Bacon's Abr.* Vol. 1. page 105. for many Cases wherein the Errors and Mistakes of the Clerk in entering up Judgments are amendable. *Ibidem.*

Where a Record is amendable as aforesaid, if a Writ of Error be brought, the Defendant in Error shall pay all the Costs of the Writ of Error; because until the Record was amended, the Plaintiff in Error had sufficient Reason to bring the Writ, but then the Plaintiff in Error must nonsuit his Writ; for if

Writ of Error where a Record is amendable, Defendant in Error to pay Costs, but Plaintiff to nonsuit his Writ.

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Amendment and Jeofail.

if he proceed to reverse the Judgment on any other Error, there the Defendant shall not pay Costs for his Amendment; because it is plain, that the Plaintiff did not depend on the Error that the Defendant had amended. 3 *Lev.* 344, 345. 1 *Salk* 49.

If any Part of the Record be vitiated by Razure, the Court will restore it by Amendment; because, the wickedness of any Person in corrupting the Records of the Court ought not to obstruct the Justice of the Court, or Prejudice any of the Parties. 1 *Rol. Abr.* 208, 209.

So if any part of the Record be stolen, taken away, withdrawn or avoided by any Clerk, though this be Felony by 8 *Hen.* 6. ch. 12. yet this may be supplied and amended by the other parts of the Record; but if such Part stolen, &c. or obliterated, cannot be supplied by the Record, or any Exemplification thereof, then it shall not be amended. 8 *Co.* 160. *B. Bacon's, Abr.* 109. See *Demurrer, Error, Pleadings.*

The End of the first VOLUME.

